Supreme Court of the United States.

OCTOBER TERM, 1876.

FARMERS' LOAN AND TRUST COMPANY,
Complainant,

RUSSELL SAGE, JAMES BUELL AND N. A. COWDREY, Intervenors,
Appellants.

vs.

THE CENTRAL RAILROAD OF IOWA, *et al.*,
Appellees.

No. 731.

BRIEF OF N. A. COWDREY, *Solicitor for Appellants.*

Upon motion of certain bondholders to dismiss appeal. Page 9.

To vacate supersedeas bond. Page 13.

Also upon merits of the appeal. Page 15.

STATEMENT OF FACTS.

This cause comes to this Court upon appeal of certain intervenors, holders of bonds purporting to be secured by a mortgage deed of trust, given by the Central Railroad of

Iowa to the Farmers' Loan and Trust Company in trust, to secure the payment of $4,000,000 bonds, of which amount $3,700,000 were issued.

The Mortgagors made default in the payment of interest, January 15th, 1873.

Bill of foreclosure was filed by the Trustee in the Circuit Court of the United States for the District of Iowa. At the October Term of said Court, viz., Oct. 22d, 1875, a decree of foreclosure and sale was made by the Court. At the same Term of the Court, viz., Jan. 14th, 1876, the Court opened said decree and proceedings, and heard and denied a motion to set aside said decree. The Court, at the same date, made an order allowing the appellants to intervene and to become parties in this cause.

The decree does not purport on its face to be a decree entered by consent. The Judges of the Circuit Court, on said 14th day of Jan., 1876, filed a statement, which is made a part of the record, tending to show that such of the parties as were before the Court consented to it, except the complaint, who, by its solicitor, would only say that "the Trustee wished faithfully to execute its trust under the direction of the Court;" that certain of its *cestui que trust*, there named, objected to the form of the decree, and that it, the Trustee, submitted itself to the advice and direction of the Court, whereupon the Court entered the decree.

The supplemental proceedings in this cause had on Jan. 14th, 1876, are given in full, and are as follows, viz. :

Friday, Jan. 14th, 1876.

And now, on this day, to wit, January 14th, 1876, (it still being of the October Term, 1875,) this cause came on for hearing upon the motion of Russell Sage, James Buell, and N. A. Cowdrey, filed herein January 13, 1876, to set aside the decree of this Court herein rendered, October 22, 1875, which motion, after hearing counsel for and against the same, was by the Court denied; to which order the said Sage, Buell and Cowdrey then and there excepted.

And on the same day, to wit, January 14, 1876 (it still being of the October Term, 1875), this cause came on for hearing upon the petition of said Russell Sage, James Buell, and N. A. Cowdrey, filed herein January 11, 1876, stating that they were owners of First Mortgage Bonds to over $200,000 at their face value, exclusive of interest, and praying to intervene in the suit and become parties thereto. And upon the petition in behalf of the said Sage, Buell and Cowdrey, by the said Farmers' Loan and Trust Company, Trustee, and the complainant herein, presented to the Circuit Judge at St. Paul, Dec. 16, 1875, as follows:

Now comes the Farmers' Loan and Trust Company and as Trustee in said cause for Russell Sage, James Buell, and N. A. Cowdrey, and plaintiff in said cause, prays of the Court that an appeal may be allowed to said plaintiff, and tenders to the Court an Appeal Bond, with a request that the same may operate as a supersedeas.

Farmers' Loan and Trust Company,
by Grant and Smith, Solicitors,

and his order thereon, which is as follows:

In this case an appeal is asked by the complainant, so far, and only so far, as it affects the interests of Russell Sage, James Buell and N. A. Cowdrey.

I deny the appeal prayed for because, 1st, The decree in question was entered by consent of all the parties in interest. (The Term at which the decree was rendered has not yet ended, but stands adjourned until January next, and the proper course is for the parties, in whose behalf an appeal is sought, to then appear, and if the decree is erroneously entered, or is improper, to apply to be made parties, or to have the decree corrected or a new decree entered).

2d. An appeal cannot be taken on behalf of certain

bondholders, not parties to the record, leaving the rest of the decree unappealed from.

As the Trustees (complainants) do not ask for an appeal from the whole decree, I need not consider ~~where~~ they would be justified, in a case where there are several millions of dollars of bondholders who acquiesce in the decree, to appeal at the instance of these bondholders, who only claim to hold bonds to the extent of $200,000.

3d. If an appeal could be allowed as asked for, the bond offered is insufficient as to amount to secure costs, damages for delay, and costs and interest on the appeal.

The clerk will enter the above order of record, denying the appeal prayed for.

At Chambers, St. Paul, Dec. 16, 1875.

JOHN F. DILLON, *Circuit Judge.*

Upon consideration of the premises it is now by the Court ordered, that the said Sage, Buell and Cowdrey, be and they are hereby permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their said several interests therein, and in their own names, an appeal to the Supreme Court from the decree entered herein, on the 22d day of October, 1875; or if said Sage, Buell and Cowdrey desire said appeal to operate as a supersedeas, the bond for that purpose is fixed at the sum of $1,000,000; to be given in thirty days from this date, and if so given said appeal shall be regarded as taken and perfected on the 16th day of December, 1875; the said parties having then applied as aforesaid for said appeal, and having delayed the same till this time, by order of the judge at Chambers, as above shown; but if said appeal is not to operate as a supersedeas, the bond is fixed at the sum of $2,000.

(STATEMENT OF JUDGES DILLON AND LOVE.)

And as to whether the said decree of Oct. 22, 1875, rendered herein, was a decree by consent, the following are the facts in addition to those appearing on the record and Master's Reports and the proofs on file, to wit:

At the said October Term, the complainant herein, viz.: The Farmers' Loan and Trust Company, appeared by solicitor, James Grant, Esq., the Iowa Central Railroad Company, by its solicitor, the other defendants by their attorneys, and there also appeared several attorneys for committees of various bondholders; and all of said parties, the complainant and the defendants, agreed to the decrees entered, the same having been the result of consultation and compromise among the parties in interest, and the same was entered as the result of such agreement, and not upon an independent consideration by the Court of the rights and equities of the various parties.

The above statement that the complainant consented to such decree, is to be taken in connection with the following statement. The said solicitor for the said complainant (to wit, The Farmers' Loan and Trust Company), when the draft of said consent decree was presented to the Court by the parties in interest, said to the Court that the Trustee wished faithfully to execute its trust under the direction of the Court; that the Trustee had received the following communication which he wished to read, and which was read to the Court, to wit:

To the Farmers' Loan and Trust Co., Trustees, &c., of the First Mortgage Bondholders.

GENTLEMEN:

We are informed by your counsel, Grant & Smith, that they will ask the Court in the foreclosure suit, now pending,

to enter such decree as the majority of the bondholders desire. Believing that some of the bondholders have other interests to serve than to protect the first mortgage bondholders, and that large numbers of the bondholders, from want of proper information, have been induced to sign various requests to the Court for certain forms of decree injurious to us as bondholders, and being your *cestui que trust* to the amount set opposite our names, of the First Mortgage Bonds, to secure the payment of which you hold the mortgage as Trustee for ourselves and others similarly situated.

This is to notify you of such interest on our part, and to request you to instruct your counsel to procure the *ordinary* decree of foreclosure and sale, and failing to get this from the Court, to take an appeal to the Supreme Court of the United States.

If, for any reason, you decline to give your counsel such instructions, please inform us, that we may become a party to said proceedings, and take such course as we may be advised in the matter.

We understand the trust deed to require you to procure the ordinary decree of foreclosure and sale. If the bondholders, or a majority of them, request you, in writing, to purchase the mortgaged premises, and to form a new company, that it is competent for you to so do upon such terms and conditions as a majority of the bondholders desire.

But until you do so purchase, you are to do all you reasonably can be expected to do to protect the minority as well as the majority of your *cestui que trust.*

Respectfully your obedient servants,

New York, Oct. 1st, 1875.

Russell Sage . . .	$100,000
F. Leak, by Russell Sage .	25,000
James Buell . . .	10,000
Edwin Parsons . .	13,500

And therewith the said solicitor presented the following petition:

"Now comes the Farmers' Loan and Trust Company, and say that since they have filed their petition or information as to the application of bondholders to have the said road sold, James Buell has deposited with the said Trustee ten thousand dollars in value of first mortgage bonds of said company; Frederick Leak has deposited twenty-five thousand dollars of the same; and Russell Sage one hundred and one thousand of the same; and said parties demand of said Trustees that they procure a foreclosure and sale of said property under said first mortgage; and the plaintiffs ask the advice of the Court in the premises.

"GRANT & SMITH,
For the Trustees."

And the said solicitor for the complainant thereupon said to the Court that it submitted itself to its advice and direction, and was ready to execute any decree the Court might see proper to make, and did not otherwise object to the said proposed decree, or give the Court to understand that it was, or should be, objected to by the Trustee on behalf of any of the *cestui que trust.*

(Signed) JOHN F. DILLON.
J. M. LOVE.

The intervenors, appellants, were made parties to the record, with the right to appeal from said decree. But the Circuit Court assumed to fix terms and conditions to the rights of the appellants, such as that they must give a bond of $1,000,000, and take an appeal within thirty days (whereas the law gives sixty days with a supersedeas, and two years without a supersedeas).— *Vide Secs.* 1007, of 1008, *Revised Statutes U. S.*

The appellants applied to Mr. Justice Miller, of this Court, January 21, 1876, for liberty to appeal, which appeal was allowed, February 16, 1876, and a *supersedeas* bond of $20,000, approved.

The railroad and mortgaged premises has all the time since the bill of complaint was filed, been in the custody of said Circuit Court through its Receiver.

The questions arising upon this record are :

1st. Messrs. Ashurst & Latrobe, claiming to represent a portion of the bondholders, and having the authority of the Circuit Court to use the name of the complainant for this purpose (otherwise they have no standing in Court), move to dismiss the appeal because, as they say, the appellants have not complied with the order of January 14, I876, by which they were allowed to intervene.

2d. They claim to have the supersedeas bond vacated, because, as they say, it was not given within sixty days.

3d. They claim to have the decree affirmed.

4th. There is no dispute about the debt or the security given therefor. The only questions are, as to how the creditor shall realize the money found by the Court to be due.

The appellants are willing the decree should be affirmed, modified as requested by them, by proposed forms of modification, submitted herewith.

Form No. 1, is a redraft of the decree as appellants think it should be.

Form No. 2, is the decree of the Circuit Court, with interlineations and erasures, such as appellants deem necessary ; both forms are submitted to the Court for its action.

ARGUMENT ON MOTION TO DISMISS APPEAL.

The motion to dismiss appeal cannot be made by the defendant, the Central Railroad of Iowa, because,

1st. Judgment below was taken against them by default, or, as the movers say, *pro confesso.*

The railroad company have no interest in the matters in controversy; the amount of the debt is not in dispute. The only questions are those which relate to the distribution of the funds in the hands of the court, in which the railroad company's interest is too remote for this court to determine after the company has been defaulted below.

"Concerning small things the law cares not."

2d. We admit the movers may, if they represent bondholders, use the name of the Trustee in making this motion for the protection of the interest of the *cestui que trust*, but there is no evidence before this court, or was there before the court below, that the gentlemen making the motion represent any of the *cestui que trust* in this case.

There is no petition or motion on their part for liberty to intervene, accompanied by evidence of ownership or otherwise. Their clients are not parties to the record, except through the Trustee. The parties, other than the railroad company, for whom this motion is made, are mere bystanders and intermedlers; they do not put themselves under the jurisdiction of the Court, so that they can be held or bound by orders of the Court; the Court cannot hold them for costs because they are not parties. Bystanders and intermedlers will not be allowed to make motions in a cause.

The appellants being *cestui que trust*, have the same right to use name of Trustee to sustain appeal that the movers have to dismiss it; and greater, because the record

shows appellant's interest, while there is no record evidence showing any interest in the movers.

3d. The appellants had and have the right to become parties to the suit, without limitation or restriction, because they had proved an interest in the fund, in the hands of the Court.

This is a proceeding *in rem*, the bondholders are treated as claimants in the decree.

The decree is not only a decree of sale but one of distribution, it directs the purchaser to buy for the appellants among others, and to distribute the purchase.

The Court below was about to decree the distribution of a fund in its possession of (presumably the face of the bond and interest) say, $4,623,335, or for convenience say the face of the bond without interest, $3,700,000, in which fund the record shows the appellants to be interested to the amount of over $200,000. The appellants claim to be aggrieved by the order of distribution of that fund, viz., the decree. They appear in Court, set forth their claims, make themselves parties to the suit, and claim redress for their grievances.

The Court might have imposed the condition that the intervenors should not reopen litigated questions; this the intervenors did not ask to do.—(See their petition.)

But it was not competent for the Court to say they should not be parties to the suit, with all the future rights appertaining to them as such.

The Court below allowed the intervenors to take an appeal; they only imposed the unlawful restriction upon

the right of appeal, that if the appellants desired to take a suspensive appeal, they should give a supersedeas bond of $1,000,000 within thirty days.

This order was made January 14, 1876. Thirty days would expire February 14, 1876. Application or petition for an appeal was made to Mr. Justice Miller, January 21, 1876, within the thirty days limited by the Court below. The petition was not granted until February 16, 1876; we claim that, by fair implication, it relates back to the date of application.

The time from which the limitation begins to run in cases of appeal to the Supreme Court, is the time of the last hearing on the subject had by the Court.—Brocket *vs.* Brocket, 2d Howard, 238.

In this case that time commenced January 14, 1876.

The appeal was taken February 16, 1876, being within the sixty days limited.

4th. It is argued by the movers that the appeal should be dismissed, because the decree was entered by consent. The record does not show this to be the fact. The *ex parte* statement of the judges show that the complainant below told the court that certain *cestui que trust* did not consent, and the complainants filed the dissent of said *cestui que trust* in the case. The record shows that complainant simply said, it was in the hands of the court; this is very far from a consent being given.

The decree does not purport to be a consent decree; if it did, the appellants could appeal from it, because an inspection of the record shows that if the complainants assented, they very greatly exceeded their powers.

The agreement which the complainants, as Trustee, sought

to enforce, limited and defined the powers of the Trustee, if the mortgaged premises should be foreclosed, and if "a majority of the then outstanding bonds, secured by this mortgage, shall, *in writing*, request the said Trustee, or their successor, they are (it is) authorized to foreclose the premises embraced herein, *for the use and benefit* of the holders of the then outstanding bonds secured by this mortgage." Having foreclosed the premises, the Trustee might organize a new railroad company upon such terms, conditions and limitations, and in such manner, as the holders of a majority of said outstanding bonds secured by the mortgage, shall, *in writing, request or direct.* This authority is express, specific and conclusive.—See Mortgage; also Ashurst and Latrobe's Letter of Jan. 15, 1875.

The decree professes or undertakes to give the Trustee authority to buy the premises in trust for its own *cestui que trust*, and equally in trust for second and third mortgage bondholders, *general creditors and stockholders* of defendant's railroad company, *i. e.*, the debtor; it imposes new duties and trust, wholly inconsistent, and at variance with those accepted by the Trustees under the trust, being foreclosed.

The Trustee could not consent to such a decree and could not accept such inconsistent trust; any one of its *cestui que trust* could get a Trustee removed for undertaking such inconsistent duties.

No one knowing the high character and intelligence of the Trustee and of its Board of Directors would, for one moment, believe that it ever consented to such a decree as here appealed from.

ARGUMENT ON MOTION TO VACATE SUPERSEDEAS.

The last *official* acts of the Circuit Court in this case were had January 14, 1876. An appeal was applied for January 22d, 1876, and allowed February 16th, 1876; all within the sixty days allowed by law.—Brocket *vs.* Brocket, 2 Howard, 238.

There is no objection made in the moving papers to the sufficiency of the bond in the amount or surety.

If the limitation for taking the appeal commences October 22d, 1876, then it was not taken within the sixty days.

In that event, we respectfully ask this Court to relieve us from the unreasonable and oppressive order requiring us to give a bond of $1,000,000. It is not known, or is it believed, that there is a single person in the State of Iowa who could qualify in such an amount; it tends to prevent a review of the action of Judges of the Circuit Court; it prevents all suitors who are unable to give such a bond from asking this Court to let justice be done; it is favoring the rich at the expense of the poor; it is prohibited in many cases by Constitutional provision, or by legislation; it is in flagrant and open disregard of the principles laid down by this Court in Jerome *vs.* McCartee, 21 Wallace, 7.

If this Court thinks it cannot supervise the discretion of the Court below, when used as here appears, then we ask them to advance the cause upon its docket, and hear the appeal upon its merits, before they decide the motion to vacate *supersedeas*; in that manner they can do justice.

The complainant, appellees, and the appellants, both consent and ask this Court to advance the cause so as to be heard at the same time the motion to dismiss and to vacate are heard.

From the decree entered in this case in the Circuit Court, this appeal is taken, on the grounds which are now here assigned as errors in said decree.

ASSIGNMENT OF ERRORS.

1st. The Circuit Court attempted to force different and inconsistent duties and trust upon the Trustee, from what the parties in interest had themselves, by the trust deed, established.

2d. The 4th paragraph, or head of the decree, is erroneous, and should be reversed, except so much of it as appoints a master to make the sale, and gives instruction to the master what and how to do.

3d. The 5th paragraph, or head of the decree, is erroneous, and should be modified, as shown in the accompanying form of proposed decree.

4th. The 6th paragraph, or head of the decree, is erroneous, in so far as it discriminates in the terms of purchase in favor of the complainant. The sale should be an open one to all persons upon the same terms.

5th. The 7th and 8th paragraphs are erroneous, and should be omitted.

6th. The 9th paragraph is erroneous, and should be so modified as to state the exact amounts due upon the class of claims there named, so that any proposed purchaser would know the amount, or the approximate amount of such claims as he would have to pay or assume.

ARGUMENT UPON THE APPEAL.

There is no dispute or controversy as to the validity or amount of debt, or as to what property is pledged for its security.

All the questions arising upon the record, relate to the manner and form by which the creditor—*i. e.*, the bondholder—shall realise the debt due to him out of the property pledged to secure its payment.

A statement of the errors in the decree is a sufficient argument of the case.

With the indulgence of the Court we will briefly add a few words more:

1st. By the 4th paragraph of the decree, the Circuit Court attempts to make a new and entirely different agreement for the bondholders from that which they had themselves made in the deed of trust.

The Court finds that under certain circumstances, if the Trustee shall be requested, in writing, by a majority of the first mortgage bondholders so to do, the Trustee may buy the premises for the first mortgage bondholders, and then proceeds, in the 5th paragraph of the decree, without finding that the condition precedent has been complied with, viz., the request, *in writing*, of a majority *of bondholders*, to direct the Trustee to buy it in trust for the holders of other mortgage bonds, viz., *second and third mortgages, creditors and stockholders* of the defendant railroad company; and then, as if they were afraid that such a harmless decree had possibly foreclosed somebody (in the 8th paragraph), the decree in substance says, that no one having a judgment or other lien upon the property, or any one claiming *rights* or equities in or to the mortgaged premises by virtue of contracts, &c., shall be affected by the decree.

Why call this a decree of foreclosure? Who is foreclosed? Not the debtors, for the only one who can, under the peculiar form of this decree (see 6th paragraph), buy the premises, viz., the Trustee, is required to buy in trust for the stockholders who are the debtors. It is like as if it read, "whereas the bondholders and their Trustee have agreed to do one thing, therefore, the Trustee shall be required to do an entirely different thing; and whereas the bondholders have agreed, under a certain contingency, to associate themselves as the owners of the mortgaged premises, therefore, they shall take into co-partnership with them their former debtors, and *all its creditors*."

2d. The 9th paragraph of the decree should have required the master to have reported, *before* the *sale*, the amount of *costs*, *fees and expenses*, which the purchaser would be required to pay, otherwise no purchaser could bid intelligently, or know, within a large amount, what sum he would be required to pay. It should, properly speaking, be set out in the decree itself, but if not there found, it should be definitely fixed, so that any proposed purchaser could ascertain the amount by looking at the records of the case in the clerk's office.

3d. The decree is not responsive to any pleading in the case; no such questions were submitted to the court as the decree passes upon.

The bill of complaint asks to have the debt established, and in default of the debtor paying it, that its property shall be sold for the purpose of paying the debt.

The decree, as entered, and so far as the record of the questions at issue shows, without any party asking for any such decree, orders a sale, and practically limits the purchaser to one person, the Trustee, and directs him to buy it in trust for almost everybody except the creditor seeking

to collect his debt, and to form a company organized upon principles to be hereafter approved by the Circuit Court, (*vide end of 5th paragraph*) compelling the creditor to go into a co-partnership for transporting persons and property, with a great many other individuals and interest, willing or unwilling.

4th. The appellants have not heretofore, in this brief, quoted many authorities, they have assumed that this high court were quite familiar with the elementary principles of equity, and with its own administration of these principles.

With the indulgence of the Court they will now quote several authorities not referred to in the books, sustaining, as we think, our views of the decree in this case.

JUDGE DILLON says the decree was not entered upon the independent consideration of the Court of the rights and equities of the various parties, thus disclaiming any judicial paternity for the decree.—See printed record.

Hon. JAMES GRANT, the solicitor for the Trustee, and upon whose motion the decree should have been entered, if it was the decree he asked for, and a consent decree, writes to the appellants under date of November 7, 1875: "My judgment is, that the whole decree is a *fraud and a sham* to keep the present managers in power. I told Starr and Latrobe, who are lawyers, that I thought so; but Latrobe said, 'I have interested friends, and I must stick by them.'"

Mr. RICHARD LEWIS ASHURST and J. H. B. LATROBE, in writing under date of January 15, 1875, inform the Trustee, that, "the power of purchase contained in the mortgage, by which the title is to vest in a new company, etc., and the bondholders are, under certain contingencies, allowed only to claim their proportionate interest in said company, *applies only to a sale made for the benefit of*

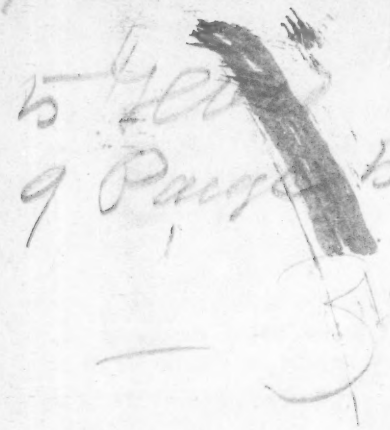
first mortgage bondholders exclusively; under this power the purchase must be for them alone."

5th. We submit herewith two forms of decree:

No. 1 is the decree as the appellants claim it should be. No. 2 is the decree entered below, with such interlineations and erasures as appellants think should be made in it; both of which we respectfully ask the Court to consider, and whichever, if either, are found to be just and equitable, to enter the same in this Court.—See Sec. 701, Rev. Stat. U. S.

N. A. COWDREY,

Solicitor for Appellants.



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IN THE SUPREME COURT OF THE UNITED STATES.

The relation and petition of Thomas Kelso, The Baltimore Equitable Society and Thomas Kensett, of Baltimore, Maryland, Edwin M. Lewis, of Philadelphia, Pennsylvania, Trustee of the Estate of Jay Cooke & Co., acting herein by and under the order and direction of the Committee of creditors chosen for said Estate, Henry G. Timmons, Edward Fox, H. N. Jones, C. A. Gilson of Portland, Maine, The York County Savings Bank of York Co., Maine, The Biddeford Savings Bank of Biddeford, Maine, The Auburn Savings Bank of Auburn, Maine, The Lewiston Savings Institution of Lewiston, Maine, Charles Alexander, William Warren, and J. W. Randall of Boston, Mass., A. Z. Brown, Cambridge, Mass., J. J. Hansen of Dover, New Hampshire, and Joseph Wentworth of Concord, New Hampshire, The Home for the Homeless of Utica, New York, and Isaac Hyde, Jr. of New York City, New York, respectfully represents as follows:—

I. These relators are bondholders holding bonds made by the Central Railroad Company of Iowa, and secured by a first mortgage on the Road Property, Estate and Franchises of the said Railroad Company to the Farmers' Loan and Trust Company of New York in trust for bonds issued thereunder to the following amounts respectively:—

Thomas Kelso, ...	$20,000
The Baltimore Equitable Society, . . .	10,000
Thomas Kensett, ...	27,000
Edwin M. Lewis, Trustee, ...	261,000

Henry G. Timmons,	$18,000
Edward Fox,	12,000
H. N. Jones,	24,000
C. A. Gilson,	17,000
The York County Savings Bank,	17,000
The Biddeford Savings Bank,	8,000
The Auburn Savings Bank,	10,000
The Lewiston Savings Institution,	20,000
Charles Alexander,	6,500
William Warren,	14,000
J. W. Randall,	33,000
A. Z. Brown,	27,000
J. J. Hansen,	22,000
Joseph Wentworth,	12,000
The Home for the Homeless,	8,000
Isaac Hyde, Jr.,	23,000

II. Default having been made in the payment of interest on said bonds a certain suit in equity has been brought by the said the Farmers' Loan and Trust Company, Trustees under said Mortgage, in the Circuit Court of the United States for the District of Iowa against the said the Central Railroad Company of Iowa for the foreclosure of the said Mortgage of October Term, 1875. Such proceedings were had in the said suit in equity that on the 22d day of October, 1875, a decree was made in the said court for the foreclosure of said Mortgage and for the sale of the mortgaged premises thereunder. A copy of the said decree is hereto annexed marked Exhibit A.

III. These petitioners and relators in the proceedings for the foreclosure as well before as since the said decree have operated and acted in co-operation with the majority of the holders of both the first and second mortgage bonds of said Railroad as represented by the combined Committees of first and second mortgage bondholders consisting of Richard L. Ashhurst of Philadelphia, Pa., John H. B. Latrobe of Baltimore, Md., Henry J. Boardman, Charles Alexander, and A. V. Lynde of Boston,

Mass., Thomas B. Reed of Portland, Maine, Edmund Wetmore, Peter Starr, and George T. M. Davis of New York, and now bring this petition and suggestion, as well for and on behalf and at the desire of the first mortgage bondholders to the total amount, including the relators, of more than $2,300,000 represented by and sustaining said Committees, as in their own behalf.

In pursuance of this action, these relators and petitioners as will be seen by reference to the said decree of which copy is annexed as aforesaid, also the report filed in said case by Lewis M. Fisher, Esq., Special Master, a copy of which is also hereto annexed marked Exhibit B, united said other bondholders to a total amount of by petition in asking the said Circuit Court to so order the foreclosure and sale of the said mortgaged premises as to preserve the priority of the said first mortgage bondholders, and at the same time permit the holders of the subsequent liens in interest to participate in the benefits of the said sale and foreclosure.

And the said decree was entered as in fact appears upon its face, in order to meet the views and carry out the wishes and protect the interest of these relators and petitioners and the other bondholders under said Mortgage co-operating with them in this matter.

IV. Subsequently to the said decree Russell Sage, James Buell and N. A. Cowdrey all of New York claiming to be bondholders under said first Mortgage moved the said Circuit Court within the term to set aside and modify the said decree, which motion the said Circuit Court refused on the 14th of January, 1876, but thereupon permitted upon their application said Russell Sage, James Buell and N. A. Cowdrey to become parties to the suit so far as to enable them to prosecute an appeal in their own names, all of which is shown by the special report of the Hon. John F. Dillon and J. M. Love, the Judges of the said Court of record in said Court, and also as hereinafter set forth, filed of record within this Honorable Court and further included in a certain opinion hereinafter referred to delivered by this Court. Of this

report or statement a copy is hereto annexed marked Exhibit C. Said Russell Sage *et al.* took an appeal under the leave thus granted to them, and on the 16th of February A. D. 1876, his Honor, Mr. Justice Miller, made an order of which a copy is hereto annexed marked Exhibit D, by which said appeal was ordered to operate as a *supersedeas*.

V. Subsequently, your petitioners and relators and certain other bondholders acting with them, made an application to this Honorable Court in the name of the Farmers' Loan and Trust Company, the Trustee under said Mortgage and plaintiff of record in said suit, to vacate said order of *supersedeas* granted as aforesaid by his Honor, Mr. Justice Miller. This application was heard and fully considered by this Honorable Court and on the day of December, 1876, the said motion was granted, and the said order of *supersedeas* vacated by this Court and an opinion filed, of which a copy is hereto annexed marked Exhibit E, in which the case was fully discussed, and the reasons for such action clearly explained.

VI. By reason of the vacation of the said order of *supersedeas*, the said decree remains nothwithstanding the appeal pending in this Court in full force and virtue, and not liable to be stayed, amended, modified, set aside or impeded by any power but that of this Court on the final hearing of the appeal. And said decree is therefore ripe and in a fit state for execution, and it is the duty of the said Circuit Court on the application of any person or persons interested therein, or for whose benefit the same said decree is made to carry the same into effect and execution.

VII. Thereupon the relators and other bondholders through Hon. C. C. Cole one of their counsel applied to L. M. Fisher, Esq. the Special Master appointed in said decree for the purpose to carry out and execute the said decree. The said L. M. Fisher, Esq. thereupon on or about the 20th of January, A. D. 1877 submitted the said application to the judges of said Court viz.,

Hons. John F. Dillon, and J. M. Love, their actions in the premises is shown by the letter of Hon. J. M. Love to Hon. John F. Dillon, and the letter of said Hon. John F. Dillon to the said L. M. Fisher, Esq. the master aforesaid of which copies are hereto annexed marked Exhibits F 1, and F 2. On the receipt of said letters the said L. M. Fisher declined and refused to take any action in the premises and to carry out and execute the said decree by advertising the premises for sale or otherwise.

VIII. On behalf of the relators and other bondholders Isaac M. Cate, R. L. Ashhurst, and J. H. B. Latrobe, on the 6th day of February, 1877, filed in the said Circuit Court for the District of Iowa a motion for the execution of the said decree in the following terms and language:—

The Farmers' Loan and Trust Company et al.

vs.

The Central Railroad of Iowa et al.

In the United States Circuit Court for the District of Iowa.

Now come Isaac M. Cate, R. L. Ashhurst and John H. B. Latrobe, Committee on part of a large majority of the bondholders, for whom the complainant is only Trustee, and move the court to order execution on the decree made by this Court October 22d, 1875, to be made by the Master pursuant to the terms of said decree and for cause show:

1. That the *supersedeas* staying such execution has been duly vacated.

2. That the Trustee, the Complainant has some interest adverse to the bondholders, the precise nature of which is not known to your Committee, whereby said Trustee refused to order the Master to execute the decree.

3. That the Master refuses to execute said decree, unless ordered by the Court or Trustee.

4. That the interests of all the bondholders, and especially those represented by your Committee, which constitute a large majority thereof, require the execution of the decree at once.

(Sgd.) R. L. ASHHURST *et al.*
For the Motion.

(Sgd.) C. C. COLE,
Of Counsel.

(ENDORSEMENT.)—The Farmers' Loan and Trust Company *et al. vs.* The Central Railroad of Iowa *et al. Motion.* Filed Feb. 6, 1877. E. R. Mason, *Clerk.*

And on the 10th of February, 1877, said R. L. Ashhurst, J. H. B. Latrobe, and Isaac M. Cate for the relators and other bondholders, and Charles Alexander, one of your relators, in his own right filed in the office of said Court the affidavit of said Alexander in the following terms and language, and with a further motion based thereon also here following:—

The Farmers' Loan and Trust Company
vs.
The Central Railroad Company of Iowa.
No. 501.

The undersigned on oath say that I am the owner and holder of bonds under the first mortgage of the Central Railroad Company of Iowa to the Farmers' Loan and Trust Company Trustee Nos. 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845 and 1509 of the denomination of $500, and 1370, 1372, 1373, 1377, 2775, 2757, 2758, 2770, 2202, 1953 and 691, of the denomination of $1000, in all $16,500 (as will appear by the records of the Court), which mortgage has been foreclosed,

and the property ordered for sale by the decree (copy hereto annexed) of the United States Circuit Court for the District of Iowa bearing date October 31, 1875, which property is ordered to be sold forthwith four weeks' notice of time and place to be given by a Master appointed for that purpose.

That one L. M. Fisher having been appointed Master under said decree for the purpose of making and conducting the sale under said decree has not complied with the order of said decree within the time therein prescribed.

(Sgd.) CHARLES ALEXANDER.

STATE OF MASSACHUSETTS, SUFFOLK, } *ss.*

CITY OF BOSTON, February 2d, 1877.

Personally appeared before me, the within-named Charles Alexander and made oath to the truth of the within instrument by him described.

In Witness Whereof, I have hereunto set my hand and seal of office the day and year above written.

(Sgd.) HENRY D. CLARY,
Notary Public.

[SEAL]

The Farmers' Loan and Trust Company et al.

vs.

The Central Railroad of Iowa et al.

In the U. S. Circuit Court District of Iowa.

Now come R. L. Ashhurst, John H. B. Latrobe and Isaac M. Cate, Committee of the bondholders for whom the plaintiff is trustee and also comes Charles Alexander in his own right, as a bondholder, whose ownership of bonds for the payment of which, the plaintiff as Trustee, holds the property described in

3. That the Master refuses to execute said decree, unless ordered by the Court or Trustee.

4. That the interests of all the bondholders, and especially those represented by your Committee, which constitute a large majority thereof, require the execution of the decree at once.

(Sgd.) R. L. ASHHURST *et al.*
For the Motion.

(Sgd.) C. C. COLE,
Of Counsel.

(ENDORSEMENT.)—The Farmers' Loan and Trust Company *et al. vs.* The Central Railroad of Iowa *et al. Motion.* Filed Feb. 6, 1877. E. R. Mason, *Clerk.*

And on the 10th of February, 1877, said R. L. Ashhurst, J. H. B. Latrobe, and Isaac M. Cate for the relators and other bondholders, and Charles Alexander, one of your relators, in his own right filed in the office of said Court the affidavit of said Alexander in the following terms and language, and with a further motion based thereon also here following:—

The Farmers' Loan and Trust Company
vs.
The Central Railroad Company of Iowa.
No. 501.

The undersigned on oath say that I am the owner and holder of bonds under the first mortgage of the Central Railroad Company of Iowa to the Farmers' Loan and Trust Company Trustee Nos. 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845 and 1509 of the denomination of $500, and 1370, 1372, 1373, 1377, 2775, 2757, 2758, 2770, 2202, 1953 and 691, of the denomination of $1000, in all $16,500 (as will appear by the records of the Court), which mortgage has been foreclosed,

and the property ordered for sale by the decree (copy hereto annexed) of the United States Circuit Court for the District of Iowa bearing date October 31, 1875, which property is ordered to be sold forthwith four weeks' notice of time and place to be given by a Master appointed for that purpose.

That one L. M. Fisher having been appointed Master under said decree for the purpose of making and conducting the sale under said decree has not complied with the order of said decree within the time therein prescribed.

(Sgd.) CHARLES ALEXANDER.

STATE OF MASSACHUSETTS, SUFFOLK, } *ss.*

CITY OF BOSTON, February 2d, 1877.

Personally appeared before me, the within-named Charles Alexander and made oath to the truth of the within instrument by him described.

In Witness Whereof, I have hereunto set my hand and seal of office the day and year above written.

(Sgd.) HENRY D. CLARY,
Notary Public.

[SEAL]

The Farmers' Loan and Trust Company et al.
vs.
The Central Railroad of Iowa et al.
} In the U. S. Circuit Court District of Iowa.

Now come R. L. Ashhurst, John H. B. Latrobe and Isaac M. Cate, Committee of the bondholders for whom the plaintiff is trustee and also comes Charles Alexander in his own right, as a bondholder, whose ownership of bonds for the payment of which, the plaintiff as Trustee, holds the property described in

the trust deed, which ownership is shown by his affidavit annexed hereto, and said persons state separately and collectively that the decree rendered by this Court in this cause, on the 22d day of October 1875, was an order in favor of said persons, and each of them and that they respectively and collectively still have an interest in the enforcement and obedience to such order and decree.

And they further state that Lewis M. Fisher, Esq., the Master appointed by said decree has not complied with his duties as therein specified but upon request of the persons now here making this motion has refused to comply with the order therein made to wit: to make the sale forthwith, upon the default to pay as in the said decree specified, and move the Court, as well as ask and demand of the clerk that a Writ of Attachment shall issue against the said Lewis M. Fisher, Esq., Master as provided by Equity Rules 8, 9 and 10 and that said Master be attached thereon, and not discharged from said attachment, unless upon a full and prompt compliance with the decree, and the payment of all costs, and that if the said delinquent party cannot be found, that a Writ of Sequestration shall issue as provided by said rules. And in case the Clerk shall refuse to issue the Writ of Attachment hereby applied for, the persons making this motion individually and collectively ask that an order be made at the March rule day, directing the Clerk to issue such Writ.

And as in duty bound will ever pray, &c.

(Sgd.) R. L. ASHHURST and
JOHN H. B. LATROBE *et al.*
For the Motion.

(Sgd.) C. C. COLE,
Of Counsel.

(ENDORSED.)—The Farmers' Loan and Trust Company *et al. vs.* The Central Railroad Company of Iowa *et al.* Motion for Writ of Attachment. Filed Feb'y 10, 1877. E. R. Mason, *Clerk.*

About the time of the filing of the said motion, Hon. C. C. Cole, of Counsel for these relators and other bondolders co-operating with them, wrote Lewis M. Fisher, Esq., Master in said cause, a letter giving notice of the application for attachment referred to in said motion, to which said L. M. Fisher replied by letter of February 10th, 1877, acknowledging receipt thereof, copies of which notice and acknowledgment are hereto annexed marked Exhibits G1 and G2.

Thereupon on the same date of filing of said motion, the Hon. John F. Dillon, Circuit Judge of said District delivered to E. R. Mason, Esq., Clerk of said Court, a letter in the language and terms following:—

DAVENPORT, Feb'y 10, 1877.

Ed. R. Mason, Esq., Clerk U. S. Circuit Court Des Moines, Iowa,

DEAR SIR:—I have been shown by L. M. Fisher, Esq. General Master in The Farmers' Loan and Trust Co. *vs.* The Central R. R. Co. of Iowa, notice of application for a writ of attachment.

As Mr. Fisher has in this matter acted on the directions of the Judges of the Court in writing, this is to direct you not to issue a writ of attachment without an order from one of the Judges of the Court, and you may notify counsel hereof, and also Judge Love.

JOHN F. DILLON.

whereby he forbade the said Clerk, from issuing the attachment applied for on behalf of these relators on the ground that the action of the Master in refusing to carry out the decree was in pursuance of the direction of the Judges of the Court.

IX. On the 3d of February, 1877, R. L. Ashhurst, the Chairman of the Committee of first and second mortgage bondholders, on behalf of these relators and the other bondholders co-operating with them, gave a notice and made a demand and request to and of the Farmers' Loan and Trust Company, the Trustees under said Mortgage and complainants in said suit, requesting and demanding of them to proceed to carry out,

execute and put into effect said decree. A Copy of said notice will be found appended to the next succeeding Exhibit.

Thereupon the said the Farmers' Loan and Trust Company filed a petition to the said Judges of the Circuit Court of the United States for the District of Iowa, setting forth the said notice from the said R. L. Ashhurst just above referred to, and also a certain other pretended notice given them in behalf of Russell Sage *et al.*, the said appellants, and others co-operating with them, and asking the instruction and direction of the said Circuit Court of the United States for the District of Iowa, whether the said Farmers' Loan and Trust Company should proceed to execute and carry into effect the said Decree. A copy of the said petition, as well as of the said notices and request thereto appended, is hereto appended marked Exhibit H. These relators and other bondholders, as well as the said Committee co-operating with them, filed an answer to the said petition of the Farmers' Loan and Trust Company, setting forth the reasons why it was the duty as well of the said Trustee as of the said Court and its officers to execute and carry into effect said decree. A copy of the said answer is hereto annexed, marked Exhibit I.

X. Thereupon, on the 22d day of February, 1877, the Hon. John F. Dillon, Circuit Judge of the said District, made an order for the hearing of the said petition of the said Trustee and the application for orders for execution of decree, of which a copy is annexed marked Exhibit J.

XI. In consequence of this order of the Judge of said Circuit Court, a hearing was had at chambers at Davenport, in the State and District of Iowa, on the third day of March, 1877, before the Hon. John F. Dillon, the Circuit Judge of said Court, when and where the rights and demands of the relators for the execution of said decree were presented and impressed upon said Court by counsel for the relators and other bondholders and instructions and directions as to the execution of said decree sought and asked of said Court by the counsel for the Farmers' Loan and Trust Company, the Trustees of said Mortgage, and complainants

in said suit. After consideration of the argument and consultation between Judge Dillon, the said Circuit Judge, and Judge Love, the District Judge, the opinions hereto annexed, marked Exhibits K 1 and K 2, were filed in said Court by the said Judges Dillon and Love respectively, and the order hereinafter immediately inserted made and entered by said Circuit Judge, Hon. John F. Dillon, in the terms and language following:—

The Farmers' Loan and Trust Company

vs.

The Central Railroad Company of Iowa et al.

In the Circuit Court of the United States for the District of Iowa.

This cause coming on for hearing on the 3d day of March, A. D. 1877 before me at my chambers in the city of Davenport upon an application made by certain bondholders of the Central Railroad Company of Iowa represented by R. L. Ashhurst and upon an application made to the court by the Farmers' Loan and Trust Company under the Trustee for advice and direction concerning the sale of said Central Railroad under the decree rendered in this cause, and said bondholders appearing by R. L. Ashhurst their attorney. The Farmers' Loan and Trust Company by H. B. Turner and the bondholders opposing said application for sale by N. A. Cowdrey their respective counsel, and the said application having been submitted upon the pleadings and decrees of Court in said cause, it is hereby ordered that the said application for an order on the Master to sell said Central Railroad be denied and that the Court declines and refuses to order the Trustee to cause a sale to be made at the present time.

(Signed) JOHN F. DILLON,
Judge.

March 12th, 1877.

Whereby the relators' application for the execution of the decree was absolutely denied, and the application for an order

for the said Farmers' Loan and Trust Company to cause a sale was also refused.

XII. By reason of the premises, the relators, while having a clear and incontrovertible right to the execution and carrying into effect of the said decree made in their favor, are denied and deprived of their said right, and have suffered and are suffering great damage by reason of such denial and deprival of their right. And inasmuch as the relators have no specific or adequate legal remedy for the redress of the injury suffered, there will be a failure of justice unless a writ of mandamus is granted.

Wherefore the said relators pray this honorable Court to issue a writ of mandamus to the said Hon. John F. Dillon, the Circuit Judge, and J. M. Love, the District Judge, the Judges of said Circuit Court, commanding them to carry into effect and execute the said decree entered in said cause October 22d, 1875, and to give appropriate and fitting orders and directions to the masters, clerks, officers, employees, and servants of said Court and parties subject to its orders, so that said decree may be at once executed and the sale of the road property and franchises as therein provided carried into effect.

And your petitioners and relators will ever pray.

DISTRICT OF ss.

Personally appeared before me the undersigned

of the said relators and petitioners who being duly affirmed did depose and say that the matters contained in the foregoing relation and petition so far as within affiant's own knowledge are true and so far as stated on the information of others, are true to the best of affiant's knowledge and belief.

Exhibit A.

DECREE ~~IN COURT BELOW~~

The Farmers' Loan and Trust Company, Trustee,	United States Circuit Court for the District of Iowa.
vs.	In Equity.
The Central Railroad Company of Iowa.	October Term, 1875. No. 501.
	Friday, Oct. 22d, 1875.

This cause coming on to be heard upon the pleadings, the proofs taken, and the reports of the master, Lewis M. Fisher, heretofore filed in said cause, and the several parties in interest appearing by counsel. This cause was submitted and taken under advisement by the court, and now said court finds, orders, and decrees—

First.—That the first mortgage in the bill set forth was duly executed and delivered to complainant as trustee for the owners of the bonds therein described, on the fifteenth day of July, 1869' for the purpose of securing the payment, principal and interest, of the certain bonds of said Central Railroad Company of Iowa, amounting in the aggregate to the total sum of $3,700,000.

That default in payment of the interest accruing on said bonds has been made, there being now past due the sum of $623,334.99 up to October 15th, 1875, which amount thus due, together with the principal sum of $3,700,000, forms the first and paramount mortgage now upon the property in the bill described; that default has been made in the performance of the conditions of said mortgage through the non-payment of said interest as aforesaid, entitling complainants to a decree of foreclosure, and the court finds there is due on said mortgage, for principal and interest, the sum of $4,623,334.99 in gold, on the 15th of October, 1875, which now it is ordered that defendant, the Central Railroad Company of Iowa, shall pay in ten days from this date, with seven per cent. interest in gold, from the 15th of October, 1875; and if said defendant

shall not pay the same, then the mortgagees of the second and third mortgage, and said judgment creditors, or any of them, in the order of their respective liens, shall pay the same, and upon such payment, with costs, the said plaintiffs shall satisfy and discharge said mortgage debt, interest, and costs, and in default of said payment by any of said parties their equity of redemption in said premises is forever barred and foreclosed.

Second.—That the second mortgage in the bill described was duly executed and delivered to complainant, as trustee for the owners of the bonds therein described, on the fifteenth day of April, 1871, for the purpose of securing the payment, principal and interest, of the certain bonds of respondent in said mortgage described, amounting in the aggregate to the total sum of $925,000; that there is now justly owing to the holders of said bonds the sum of $1,136,246.86, including principal and unpaid interest up to October 15th, 1875; that the said second mortgage and the bonds secured thereby are a lien upon the property of respondent in said bill described, dating from the said fifteenth day of April, 1871, being next in priority to the lien of said first mortgage hereinbefore described; that said respondent has made default in payment of the interest coming due upon said several bonds secured by said mortgage.

Third.—That the third mortgage in the bill described was executed and delivered by respondent to the complainant, as trustee, on the fifteenth day of May, 1872, for the purpose of securing payment of certain bonds in said mortgage described; that there is now outstanding $420,000 of the bonds secured by said third mortgage.

Fourth.—The court further finds, that with a view to prevent a sacrifice of the mortgaged property by a forced sale, in case of default, it was expressly agreed and stipulated in said first mortgage or trust deed, that in case of any judicial foreclosure sale of the mortgaged property under decree of court,

upon request of a majority of the bondholders the said trustee should purchase the premises in the mortgage described, for the use and benefit of the bondholders; and that upon such purchase the title of said property should vest in said trustee, and that no bondholder should have any claim to the premises or to the proceeds thereof, except for his *pro rata* share of the proceeds of said purchased premises, as represented in a new company or corporation, to be formed and organized upon such terms, conditions, and limitations and in such manner as the holders of a majority of said outstanding first mortgage bonds secured by said mortgage should in writing request or direct.

That for the purpose of carrying out these promises in said mortgage contained, and in view of the fact found by the master and confirmed by the court that the mortgaged property will not sell in cash for near enough to pay the amount due thereon, and that the several parties in interest, including the first, second, and third mortgage bondholders, general creditors, and stockholders in said Central Railroad Company of Iowa, have united in asking the court to so order the foreclosure and sale of said mortgaged property as to preserve the priority of the first mortgage bondholders and at the same time permit the holders of the other subsequent liens and interests to participate in the benefit of such sale and foreclosure, it is therefore further ordered and decreed, that Lewis M. Fisher be and is hereby appointed a master, for the purpose of making and conducting the sale under the decree of said mortgaged property, the same to be sold under the provisions of said first mortgage in the bill described. The said sale to be made forthwith, in default to pay, as herein decreed, at the front door of the county court-house, in the city of Marshalltown, Iowa,—four weeks' notice of the time and place of said sale to be given by said master, by publishing notice thereof in the *Financier*, New York, and the Des Moines *Register*, and one newspaper published in Marshalltown, Iowa. That such property be sold to the highest bidder, and that the master make full report of his proceedings to this court for

its consideration and approval. The said sale so made by said master not to be deemed to be final until approved by this court.

Fifth.—That the said Farmers' Loan and Trust Company, complainant herein, for the purpose of carrying out the agreement of the parties to said mortgage, is hereby authorized and directed to bid at the sale of said mortgaged property as trustee for the first mortgage bondholders, bidding thereat, at least, the amount of principal and interest of said first mortgage bonds.

That if said trustee as aforesaid shall become the purchaser of said property at such sale, the title shall pass absolutely to said trustee, subject, however, to the trusts herein indicated on behalf of the several parties in interest, being the first, second, and third mortgage bondholders, creditors, and stockholders of the Central Railroad Company of Iowa; and said property shall be conveyed by said trustee to a corporation organized, or to be organized, for the purpose of acquiring said property, under the provisions of said first mortgage and of this decree, and to be approved by a majority of said first mortgage bondholders, in which said corporation the controlling interest and power of management shall be given to the first mortgage bondholders in such manner as the majority of such first mortgage bondholders shall indicate and provide; and in which the second mortgage bondholders shall receive a second class of stock for the full amount, principal and interest, of said second mortgage bonds; and in which corporation the third mortgage bondholders and general creditors shall receive common stock at par for the respective amounts due them; and in which the stockholders of the defendant shall receive common stock at the rate of one dollar in the new corporation for every three dollars of stock held by them in the defendant corporation.

It is further ordered that said trustee shall make full report of its proceedings, under this decree, to this court, and shall submit the conveyance to be made to the new corporation

herein provided for, together with the articles of incorporation of said company, to this court for approval and confirmation.

Sixth.—That if any party, other than the complainant, should become the purchaser of said property at such sale, such purchaser shall deposit with the master, so soon as said property is struck off to him, the sum of $100,000 in gold as earnest money. And if said purchaser shall fail so to do, such failure shall be deemed a withdrawal of his bid, and said master shall forthwith again offer said property for sale under the provision of this decree; that as it is impossible to properly separate said property into parcels, the master is directed to sell the said mortgaged property and everything covered by the mortgage together as an entirety.

Seventh.—That the owners of said second and third mortgage bonds, the general creditors and stockholders of respondents, shall have the right to redeem said mortgaged property at any time within one year from the date of said sale; but if said property is not redeemed within said year from the date of said sale, then the right of redemption of said parties and all of them shall be forever barred and foreclosed. Said redemption herein last named shall be the amount of principal and interest herein named, with ten per cent. interest in gold.

Eighth.—That the right of the several parties to this suit claiming liens by judgment or otherwise upon the property of defendants, and of the several parties claiming rights or equities in and to said property or any property in the use of said railroad company or any part thereof, by virtue of contracts or cases whereby material, labor, or property has been furnished for or placed upon said defendant's road, shall not be affected by this decree, the same being taken subject to the rights and equities of said parties as the same may be established and declared hereafter by this court.

Ninth.—That John N. Rogers be and is hereby appointed special master to ascertain and report to this court the proper and total amount of costs, fees, and expenses attending these foreclosure proceedings, which said costs, fees, and expenses shall be paid out of any funds in the hands of the receiver not otherwise appropriated; and any balance left unpaid shall be a lien upon said mortgaged property in the hands of the trustee, and payment thereof shall be required of said trustee before delivering over said property to any company organized to receive and hold the same under the provisions of the trust deed and of this decree.

(Signed) JOHN F. DILLON,
Judge.

PROCEEDINGS AS TO APPEAL IN CIRCUIT COURT.

The Farmers' Loan and Trust Company

vs.

The Central Railroad Company of Iowa and others.

Circuit Court of the United States for the District of Iowa.

In Equity.

October Term, 1875, to wit, June 10th, 1876.

TO THE HONORABLE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA:

The petition of Russell Sage, James Buell, and N. A. Cowdrey, citizens of the city and State of New York, respectfully shows to this court—

That your petitioners are each of them owners of bonds issued under and purporting to be secured by the first mortgage so called, made by the defendant to the complainant, July 15th,

EXHIBIT B.

The Farmers' Loan and Trust Company

vs.

The Central Railroad Company of Iowa, and Others.

In the Circuit Court of the United States for the District of Iowa.

REPORT OF L. M. FISHER, SPECIAL MASTER.

To the Hon. Judges of the Circuit Court of the United States, for said District:

The undersigned, appointed a Special Master in Chancery in the above-entitled cause, "to report to the court the amount of the bonds issued and outstanding of first, second, and third mortgage bonds each; also whether said bonds were legally and properly issued and sold in the market for a valuable consideration; also how many bondholders, and how many dollars are represented by said bondholders, have expressed a claim for a strict foreclosure, preserving the priorities of the liens as they now are or may so express their preference before the making of such report, and how many have expressed or may express, before such report, a preference for a foreclosure and sale for cash; and to report such other and further information as will enable the court to enter a final decree in this case," respectfully reports to the court.

That, upon ample notice to the several counsel for the different parties in said cause, a hearing was held on the 10th day of August, A. D. 1875, to determine the amount of bonds issued and outstanding under the said three mortgages, and the amount legally and properly issued, and also to determine such other matters as might be brought before me by counsel.

That, after the appearance of counsel and the taking of the evidence produced at that time, said hearing was adjourned until the first day of September, 1875, for the purpose of determining the amount of third mortgage bonds issued and outstanding, and also the number, amount and priority of the judgment liens upon said railroad and property. That, ten days' notice of this hearing was given to all of the holders of the judgments as they appeared from the abstracts of the Clerks of the several counties in which said Central Railroad of Iowa is situated.

That, pursuant to said notice and adjournment, the hearing was held on that day, and certain evidence was submitted as to said judgments, but no evidence was given as to the amount of third mortgage bonds issued and outstanding, and the amount legally and properly issued. That I have, since said hearing, proceeded to determine, *ex parte*, the matters undetermined at said hearing and as to which no evidence was submitted by the respective parties or their counsel. That, after an examination of the case, and the evidence submitted by counsel, and that taken by me, *ex parte*, as aforesaid, I make the following findings of law and fact:—

I find that the first mortgage of the Central Railroad Company of Iowa, was executed and delivered to plaintiff on the 15th day of July, 1869.

That said first mortgage was duly recorded in the several counties of the State of Iowa, through which said company's railroad runs, on the dates and in the counties following, to wit: In Worth county, Sept. 16, 1869; Cerro Gordo, Sept. 13, 1869; Franklin, Sept. 11, 1869; Hardin, Sept. 10, 1869; Marshall, Sept. 14, 1869; Powesheik, Sept. 17, 1869, Mahaska, Sept. 16, 1869; Jasper, April 3, 1874; Monroe, Sept. 17, 1869.

That, under said first mortgage 1850 bonds, of $500 each, numbered from 1 to 1826, and from 1831 to 1854, all inclusive, and that 2775 bonds, of $1000 each, numbered from 1 to 155, and from 155 to 2184, and from 2186 to 2777, all inclusive, have been issued and are now outstanding. That the said bonds issued and outstanding, as aforesaid, amount in the aggregate, at their

par value, to the sum of three million seven hundred thousand ($3,700,000) dollars.

That said bonds were all sold in the market for a valuable consideration, viz.: at the average rate of eight-nine cents on the dollar, with accrued interest, and are now held by *bona fide* purchasers.

I find that the said second mortgage of the Central Railroad Company of Iowa, was executed and delivered to plaintiff, on the 15th day of April, 1871. That said second mortgage was duly recorded in the several counties of the State of Iowa through which said Company's Railroad extends, on the dates and in the counties following, viz.: Worth, June 7, 1871; Cerro Gordo, May 31, 1871; Franklin, May 31, 1871; Hardin, May 25, 1871; Marshall, May 26, 1871; Jasper, April 3, 1874; Powesheik, June 3, 1871; Mahaska, May 27, 1871; Monroe, June 5, 1871.

That 925 bonds were issued under said mortgage, all of the denomination of one thousand ($1000) dollars each. That all of said bonds are now outstanding, and that the same were sold in the market to *bona fide* purchasers at the rate of sevnty-five cents on the dollar.

That said second mortgage bonds, issued and outstanding, as aforesaid, amount, at their par value, in the aggregate, to the sum of nine hundred and twenty-five thousand ($925,000) dollars.

I find that the said third mortgage was executed and delivered by the said Central Railroad Company to the plaintiff, on the 15th day of May, 1872.

That said mortgage was duly recorded in the following counties of Iowa, and on the dates following, to wit; Worth, June 12, 1872; Cerro Gordo, June 13, 1872; Franklin. June 13, 1872; Hardin, June 14, 1872; Marshall June 15, 1872; Jasper, June 17, 1872; Powesheik, June 20, 1872; Mahaska, June 19, 1872; Monroe, June 19, 1872. That, under said mortgage bonds, numbered from 1 to 700, both inclusive, all of the denomination of one thousand ($1000) dollars each, were issued by said company. That there are now outstanding, under said third mortgage bonds, Nos. 3 to 22, 26 to 34, 72 to 74, 86 to 95,

97, 107 to 112, 117 to 146, 157 to 171, 184, 214 to 233, 237 to 384, and 399 to 555, all inclusive. That the said bonds now outstanding, as aforesaid, at their par value amount in the aggregate to the sum of four hundred and twenty thousand ($420,000) dollars. That none of said bonds were ever sold by said company. That they were all hypothecated with various parties to secure the floating debts of said Railroad Company, at the rate of about 60 cents on the dollar. That many of these bonds have been sold by the original holders, and that the books of the defendant do not show the present holders of these said bonds. That the value of said bonds is not sufficient to justify, in my opinion, the expense of an investigation into their holding. And, I, therefore, report the whole amount aforesaid, viz.: $420,000, with interest, to Oct. 15, 1875, both principal and interest being payable in gold, as due and owing by said company to the holders of said bonds. And I further report that the debts due by said Railroad Company to the original holders of said bonds should be adjudged satisfied in full.

I find that the said first mortgage bonds were payable in gold, on the 15th of July, 1899, with interest at the rate of seven per cent. per annum, also payable in gold, for which semi-annual coupons were attached to each of said bonds, payable in the city of New York, on the 15th day of July and January in each year.

That the said Central Railroad Company of Iowa, made default in the payment of the semi-annual interest on said bonds on the 15th day of January, A. D. 1873, and that such default has continued, as to that and every subsequent installment of interest, up to the present time.

That there will be due on the 15th day of October, 1875, for principal and interest, upon said bonds, the sum of four million six hundred and twenty-three thousand three hundred and thirty-four dollars and ninety-nine ($4,623,334.99) cents in gold, as will more particularly appear from Schedule "A" hereto attached.

I find that the said second mortgage bonds were payable, both principal and interest, in gold. That they bear interest at the rate of seven per cent. per annum, payable semi-annually which

interest was payable on the 15th days of April and October, in the city of New York on the presentation of semi-annual coupons annexed to each of said bonds.

That the said company defaulted in the payment of the semi-annual installment of interest which fell due on the 15th day of April, 1873, and has defaulted in the payment of every installment of interest which has subsequently become due.

I find that there is now due to the holders of said second mortgage bonds, for principal and interest on the same, the sum of one million one hundred and thirty-six thousand two hundred and forty-six dollars and eighty-six ($1,136,246.86) cents payable in gold coin as will appear from Schedule "B."

I further find the said third mortgage bonds are also payable, both principal and interest, in gold. That they bear interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York, in gold coin, on the presentation of the semi-annual coupons attached to each of said bonds, on the 15th days of May and November, in each year. That the said Central Railroad Company has failed to pay the first installment of interest which fell due on the 15th day of November, 1872, and every subsequent installment of interest which has since fallen due.

That I find that the amount due from said company to the holders of said third mortgage bonds, on the 15th day of October, A. D. 1875, for principal and interest, to be the sum of five hundred and thirty thousand seven hundred and forty ($530,740) dollars, in gold, as will more particularly appear from Schedule "C."

I further find that all the bonds issued under the three several mortgages, as aforesaid, have been for the purposes of this suit, legally and properly issued.

I find that there is now due for the operating expenses of said company's railroad, during the months of September, October, and November, 1874, to the employees thereof, the sum of thirty thousand seven hundred and ninety-seven dollars and thirteen ($30,797.13) cents.

I find from the evidence submitted, that there are judgments still outstanding and unpaid, which are liens upon the property of the company. That judgments have been rendered against said company for injuries to persons and property, which said judgments are prior liens upon the property of said company; a list of which judgments, and the amounts thereof, are hereto attached, marked Schedule "D."

That there is now due on account of said judgments the sum of thirteen thousand nine hundred and sixty-two dollars and thirty-three ($13,962.33) cents.

That appeals have been taken by said railroad company from the judgments of Finch, Williams and Moore, and that said appeals are now pending in the Supreme Court of Iowa.

That there are now judgments outstanding against said company which are inferior liens to those of the said three mortgages to the amount of seventeen thousand nine hundred and eighty-seven dollars and thirty-three ($17,987.33) cents. A list of which judgments is hereto annexed, marked Schedule "E."

I find that the judgments of Isaac M. Cate, John S. Gilman and Horace Abbott, amounting to $212,264.22, are not claimed by said parties to constitute any lien upon said company's railroad and property, and that they are not liens upon the same.

That said parties are willing, upon the advice of this court, to release their said judgments, and to stand upon the same footing as the floating-debt creditors in the Central Iowa Railway Company's plan, hereafter considered.

I find that floating-debts are claimed against said company, to the amount of about $133,538.33, for which there is no collateral security, and, in addition to this, there are certain claims now pending before this court for supplies and leases of cars.

That said company has issued and sold 44,000 shares, of $100 each, of its common stock, and that said stock amounts, at par, to the sum of $4,400,000.

That the entire length of said company's railroad track, including sidings, is 204.29 miles.

That an inventory of the property and effects of said company,

as far as it can be ascertained from the evidence submitted, is hereto annexed, marked Schedule "F."

I further find that said railroad company is hopelessly insolvent.

That its property at the present time would not sell for more than forty cents on the dollar of its indebtedness.

I find that there are substantially two plans before the bondholders for a final disposition of the road, and each favoring a strict foreclosure, preserving a priority of liens. The plans are called "The Central Iowa Railway Company and the St. Louis, Iowa and Minnesota Railroad Company." Those plans, by request of the respective counsel and committees, are herewith submitted, together with the approvals of the bondholders, stockholders and debtholders, so far as the same have come to my hands.

I find that prior to the last term of this court, a report of the Boston Committee, consisting of Messrs. Boardman, Lynde and Alexander, dated Feb. 23, 1874, was submitted to the bondholders for approval. (A copy of which report is hereto annexed.)

That 210 holders of first mortgage bonds, representing five hundred and forty-eight thousand dollars of said bonds, and 32 holders of second mortgage bonds, representing one hundred and thirty-two thousand dollars of said bonds, have expressed a desire for a reorganization of said company, so as to secure the results sought for by said report.

That said report substantially complies with, and does not conflict with, either the plans above mentioned.

I find that seventy-four bondholders, representing one hundred and sixty thousand dollars of the first mortgage bonds, and fourteen bondholders, representing seventy-seven thousand dollars of second mortgage bonds, and one bondholder, representing seventy-seven thousand dollars of the third mortgage bonds, have expressed a desire for a strict foreclosure of the several mortgages and such a decree of court as will secure a reorganization of said company, as proposed by the St. Louis, Iowa and Minnesota Railroad Company.

I find from the evidence submitted, that there are judgments still outstanding and unpaid, which are liens upon the property of the company. That judgments have been rendered against said company for injuries to persons and property, which said judgments are prior liens upon the property of said company; a list of which judgments, and the amounts thereof, are hereto attached, marked Schedule "D."

That there is now due on account of said judgments the sum of thirteen thousand nine hundred and sixty-two dollars and thirty-three ($13,962.33) cents.

That appeals have been taken by said railroad company from the judgments of Finch, Williams and Moore, and that said appeals are now pending in the Supreme Court of Iowa.

That there are now judgments outstanding against said company which are inferior liens to those of the said three mortgages to the amount of seventeen thousand nine hundred and eighty-seven dollars and thirty-three ($17,987.33) cents. A list of which judgments is hereto annexed, marked Schedule "E."

I find that the judgments of Isaac M. Cate, John S. Gilman and Horace Abbott, amounting to $212,264.22, are not claimed by said parties to constitute any lien upon said company's railroad and property, and that they are not liens upon the same.

That said parties are willing, upon the advice of this court, to release their said judgments, and to stand upon the same footing as the floating-debt creditors in the Central Iowa Railway Company's plan, hereafter considered.

I find that floating-debts are claimed against said company, to the amount of about $133,538.33, for which there is no collateral security, and, in addition to this, there are certain claims now pending before this court for supplies and leases of cars.

That said company has issued and sold 44,000 shares, of $100 each, of its common stock, and that said stock amounts, at par, to the sum of $4,400,000.

That the entire length of said company's railroad track, including sidings, is 204.29 miles.

That an inventory of the property and effects of said company,

as far as it can be ascertained from the evidence submitted, is hereto annexed, marked Schedule "F."

I further find that said railroad company is hopelessly insolvent.

That its property at the present time would not sell for more than forty cents on the dollar of its indebtedness.

I find that there are substantially two plans before the bondholders for a final disposition of the road, and each favoring a strict foreclosure, preserving a priority of liens. The plans are called "The Central Iowa Railway Company and the St. Louis, Iowa and Minnesota Railroad Company." Those plans, by request of the respective counsel and committees, are herewith submitted, together with the approvals of the bondholders, stockholders and debtholders, so far as the same have come to my hands.

I find that prior to the last term of this court, a report of the Boston Committee, consisting of Messrs. Boardman, Lynde and Alexander, dated Feb. 23, 1874, was submitted to the bondholders for approval. (A copy of which report is hereto annexed.)

That 210 holders of first mortgage bonds, representing five hundred and forty-eight thousand dollars of said bonds, and 32 holders of second mortgage bonds, representing one hundred and thirty-two thousand dollars of said bonds, have expressed a desire for a reorganization of said company, so as to secure the results sought for by said report.

By supplementary report it appears that of this sum $447,000 had declared in favor of the Central Iowa Railway or Compromise Measure.

That said report substantially complies with, and does not conflict with, either the plans above mentioned.

I find that seventy-four bondholders, representing one hundred and sixty thousand dollars of the first mortgage bonds, and fourteen bondholders, representing seventy-seven thousand dollars of second mortgage bonds, and one bondholder, representing seventy-seven thousand dollars of the third mortgage bonds, have expressed a desire for a strict foreclosure of the several mortgages and such a decree of court as will secure a reorganization of said company, as proposed by the St. Louis, Iowa and Minnesota Railroad Company.

I find that six hundred and eighty holders of first mortgage bonds, representing two million three hundred and seventy-two thousand five hundred dollars ($2,372,500) of said bonds, one hundred and one holders of second mortgage bonds, representing seven hundred and sixteen thousand dollars ($716,000) of the same, and one holder of fifty-five thousand dollars, third mortgage bonds, have expressed a desire for a strict foreclosure, under the plan proposed by the Central Iowa Railway Company. I also find that thirty-five holders of the common stock of said railroad company, representing 25,613 shares, and $2,487,500 in amount, of said stock, and six persons, holding floating debts of said company to the amount of $331,583.35, have expressed a desire for a foreclosure, in accordance with said plan.

I also find that six bondholders, representing nine thousand five hundred dollars of first mortgage bonds, have, since their approval of the St. Louis, Iowa and Minnesota Railroad Company, declared in favor of the Central Iowa Railway Company.

That the holding of nineteen thousand ($19,000) dollars first mortgage bonds, and fifty-eight thousand second mortgage bonds having changed, the present holder thereof favors the company last aforesaid.

And that two bondholders, representing one thousand five hundred dollars, first mortgage bonds, who signed petitions in favor of a foreclosure and sale, have also declared in favor of the Central Iowa Railway Company.

That ten holders, representing eighteen thousand five hundred dollars first mortgage bonds, and two bondholders, representing three thousand second mortgage bonds, have, since their approval of the Central Iowa Railway Company, signed an approval of the St. Louis, Iowa and Minnesota Railroad Company.

Said plans differ principally in these respects:—

The Central Iowa plan undertakes to pay the interest on the principal of the first mortgage bonds after the fifteenth day of January, 1881. The Boston and New York committees are, until that date, to have the exclusive management of said railroad.

The net income of the railroad is to be applied exclusively to

the payment of the seven per cent. interest on the principal of the first mortgage bonds, to the amount of that interest. That the overdue coupons on said bonds are to be funded into first preferred stock. The second mortgage bonds and the accrued interest thereon are to be funded into second preferred stock. And, further, the third mortgage bonds, floating debt and common stock, at the rate of one share in three of the present company, are to be funded into common stock of the new corporation. And that if the net income of the railroad does not in five years from the 15th day of January, 1876, pay the interest on said first mortgage bonds, then the foreclosure is to be absolute.

The St. Louis, Iowa and Minnesota Railroad Company proposes to exchange its income bonds at par, payable in thirty years for the first mortgage bonds and accrued interest.

The second mortgage bonds and unpaid coupons are to be funded into first preferred stock. The floating debt is to be funded into second preferred stock. And the common stock of the present company is to be reduced to one-fourth its present amount, and to become the common stock of the new company. The income bonds, first and second preferred stock, are each to have in the new corporation a voting representation of two votes for each $500 in amount of the same. The new bonds are to have the net income of the road exclusively to the extent of seven per cent. interest upon the same. And the other classes of securities are entitled to the same privilege in the order of their priority.

I find that the said Central Iowa Railway Company has organized. Its articles have been signed by the incorporators, duly acknowledged and filed for record. That the company is now a legal entity and prepared to transact the business contemplated by its charter.

I further find that a request has been made by certain persons, claiming to hold one hundred and forty-eight thousand dollars ($148,000) in amount of said first mortgage bonds for a foreclosure and sale of the said railroad, but that I have no evidence that said persons hold said amount or any amount whatsoever of said bonds.

I further report to the court that my expenses as Master amount to the sum of ————, an itemized statement of which is hereto annexed, and that for my services as Master in this cause I request a fee of one thousand dollars, to be taxed up as a part of the costs in the same. All of which is respectfully submitted.

LEWIS M. FISHER,
Special Master.

thereof, and that the same is true to his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

(Signed) RUSSELL SAGE,
JAMES BUELL,
N. A. COWDREY.

Sworn to before me, this sixth day of January, 1876.

[SEAL] R. E. STILLWELL,
U. S. Commissioner for the Southern District of New York.

Endorsed—U. S. Circuit Court, District of Iowa. Farmers Loan and Trust Company *vs.* Central R. R. of Iowa and others. Petition of Russell Sage and others for liberty to intervene. By leave of court. Filed January 1st, 1876. GEO. B. CORKHILL, clerk.

Exhibit "6."

The Farmers' Loan and Trust Company, Trustee,

vs.

The Central Railroad Company of Iowa, Hugh Thornton, The Le Grand Quarry Company, Lush, Carton & Co., M. M. St. John, W. H. Moore, N. J. Boardman, C. M. Stewart, Ole Oleson, I. M. Cate, J. S. Gilman, Horace Abbott, Delano Smith, Edwin Willegood, John Turner, and G. W. Maybury.

United States Circuit Court, District of Iowa.

In Equity.

October Term, 1875.

No. 501.

Friday, January 14th, 1876.

And now, on this day, to wit, January 14th, 1876 (it still being of the October Term, 1875), this cause came on for hearing upon the motion of Russell Sage, James Buell, and

N. A. Cowdrey, filed herein January 13th, 1876, to set aside the decree of this court herein rendered October 22d, 1875, which motion, after hearing counsel for and against the same, was by the court denied, to which order the said Sage, Buell, and Cowdrey then and there excepted.

And on the same day, to wit, January 14th, 1876 (it still being of the October Term, 1875), this cause came on for hearing upon the petition of said Russell Sage, James Buell, and N. A. Cowdrey, filed herein January 11th, 1876, stating that they were owners of first mortgage bonds to over $200,000, at their face value, exclusive of interest, and praying to intervene in this suit and become parties thereto.

And upon the petition in behalf of the said Sage, Buell, and Cowdrey by the said Farmers' Loan and Trust Company, trustee and the complainant herein, presented to the Circuit Court judge at St. Paul, December 16th, 1875, as follows:—

"Now comes the Farmers' Loan and Trust Company, as trustee in said cause for Russell Sage, James Buell, and N. A. Cowdrey and plaintiff in said cause, and prays of the court that an appeal may be allowed to said plaintiff, and tenders to the court an appeal bond, with a request that the same may operate as a *supersedeas*" (signed Farmers' Loan and Trust Company, by Grant and Smith, solicitors); and his order thereon, which is as follows:—"In this case an appeal is asked by the complainant so far and only so far as it affects the interests of Russell Sage, James Buell, and N. A. Cowdrey.

"I deny the appeal prayed for, because—

"1. The decree in question was entered by consent of all the parties in interest.

("The term at which this decree was rendered has not yet ended, but stands adjourned until in January next, and the proper course for the parties in whose behalf an appeal is sought is for them to appear, and if the decree is erroneously entered or is improper, to apply to be made parties or to have the decree corrected or a new decree entered.)

"2. An appeal cannot be taken on behalf of certain bondholders not parties to the record, leaving the rest of the decree

unappealed from. As the trustees (complainants) do not ask for an appeal from the whole decree, I need not consider when they would be justified in a case where there are several millions of dollars of bondholders, who acquiesce in the decree, to appeal at the instance of three bondholders who only claim to hold bonds to the extent of $200,000.

"3. If an appeal could be allowed as asked for, the bond offered is insufficient as to amount to secure costs, damages for delay, and costs and interest on the appeal. The clerk will enter the above order of record, denying the appeal prayed for.

"(Signed) JOHN F. DILLON,
"*Circuit Judge.*

"AT CHAMBERS, ST. PAUL, December 16th, 1875."

Upon consideration of the premises, it is now by the court ordered that Sage, Buell, and Cowdrey be and they are hereby permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their said several interests therein and in their own names, an appeal to the Supreme Court from the decree entered herein on the twenty-second day of October, 1875, and if said Sage, Buell, and Cowdrey desire said appeal to operate as a *supersedeas*, the bond for that purpose is fixed at the sum of $1,000,000, to be given in thirty days from this date, and if so given said appeal shall be regarded as taken and perfected on the sixteenth day of December, 1875, the said parties having then applied as aforesaid for said appeal, and having delayed the same until this time by order of the judge at chambers, as above shown; but if said appeal is not to operate as a *supersedeas* the bond is fixed at the sum of $2000.

And as to whether the said decree of October 22d, 1875, rendered herein, was a decree by consent, the following are the facts in addition to those appearing on the record and master's reports and the proofs on file, to wit:—

At the said October Term, the complainants herein, viz., the Farmers' Loan and Trust Company, appeared by Solicitor

James Grant, Esq., the Iowa Central Railroad Company by its solicitors, and the other defendants by their attorneys, and there also appeared several attorneys for committees of various bondholders; and all of said parties, the complainants and the defendants, agreed to the decree as entered, the same having been the result of consultation and compromise among the parties in interest, and the same was entered as the result of such agreement, and not upon an independent consideration, by the court, of the rights and equities of the various parties.

The above statement that the complainants consented to said decree is to be taken in connection with the following statement:—The solicitor for the said complainants (to wit, the Farmers' Loan and Trust Company), when the draft of said consent decree was presented to the court by the parties in interest, said to the court that the trustee wished faithfully to execute its trust under the direction of the court; that the trustee had reserved the following communication, which he wished to read, and which was read to the court, to wit:—

To The Farmers' Loan and Trust Company, Trustees, &c. First Mortgage Bondholders:

GENTLEMEN:—We are informed by your counsel, Grant and Smith, that they will ask the court, in the foreclosure suit now pending, to enter such decree as the majority of the bondholders desire, believing that some of the bondholders have other interests to serve than to protect the first mortgage bondholders, and that large numbers of the bondholders, from want of proper information, have been induced to sign various requests to the court for certain forms of decree injurious to us as bondholders, and being your *cestui que trust* to the amount set opposite our names of the first mortgage bonds, to secure the payment of which you hold the mortgage as trustee for ourselves and others similarly situated, this is to notify you of such interest on our part, and to request you to instruct your counsel to procure the *ordinary*

decree of foreclosure and sale, and failing to get this from the court, to take an appeal to the Supreme Court of the United States.

If for any reason you decline to give your counsel such instructions, please inform us, that we may become a party to said proceedings and take such course as we may be advised in the matter. We understood the trust deed to require you to procure the ordinary decree of foreclosure and sale. If the bondholders, or a majority of them, request you to purchase the mortgage premises and to form a new company, that it is competent for you to so do, upon such terms and conditions as a majority of the bondholders desire. But until you do so purchase you are to do all you reasonably can be expected to do to protect the minority as well as the majority of your *cestui que trust.*

Respectfully, your obedient servants,

RUSSELL SAGE, $100,000.
F. LEAKE, by RUSSELL SAGE, $25,000.
JAMES BUELL, $10,000.
EDWIN PARSONS, $13,500.

NEW YORK, October 1st, 1875.

And therewith the said solicitor presented the following petition:—

Now comes the Farmers' Loan and Trust Company and say that since they have filed their petition or information as to the application of bondholders to have the said road sold, James Buell has deposited with the said trustees $10,000 in value of first mortgage bonds of said company, Frederick Leake has deposited $25,000 of the same, and Russell Sage $101,000 of the same, and said parties demand of said trustees that they procure a foreclosure of said property under said first mortgage, and the plaintiffs ask the advice of the court in the premises.

GRANT & SMITH,
For the Trustees.

And the said solicitor for the complainant thereupon said to the court that it submitted itself to its advice and direction, and was ready to execute any decree the court might see proper to make, and did not otherwise object to the said proposed decree or give the court to understand that it was or would be objected to by the trustee on behalf of any of the *cestui que trust.*

(Signed) JOHN F. DILLON,
J. M. LOVE.

Exhibit "D."

PETITION FOR APPEAL TO HON. SAMUEL F. MILLER, AND ORDER THEREON.

PETITION OF RUSSELL SAGE, JAMES BUELL, AND N. A. COWDREY, INTERVENORS, FOR AN APPEAL, JANUARY 21st, 1876.

The Farmers' Loan and Trust Company, Complainants; Russell Sage, James Buell, and N. A. Cowdrey, Intervenors,

vs.

The Central Railroad Company of Iowa, Hugh Thornton, The Le Grand Quarry Company, Lush, Carton & Company, C. M. Stewart, M. M. St. John, W. H. Moore, Ole Oleson, H. J. Boardman, I. M. Cate, J. S. Gilman, Horace Abbott, Delano Smith, Edwin Willegood, John Turner, G. W. Maybury.

Circuit Court of the United States, District of Iowa.

TO THE HONORABLE JUDGES OF THE ABOVE-ENTITLED COURT, AND TO THE HONORABLE SAMUEL F. MILLER, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Russell Sage, James Buell, and N. A. Cowdrey, all citizens of the city and State of New York, respectfully show to your Honors—

That the above-entitled court made an order or decree at its October Term, 1875, viz., January 14th, 1876, allowing your petitioners to intervene in said case, and to take an appeal, if they so elect, from the decree of that court, made in the above-entitled cause, October 22d, 1875, but continued for further hearing by the presiding justice, by an order made at chambers at the city of St. Paul, December 16th,

1876, which further hearing was had in open court at Des Moines, and determined by the court January 14th, 1876, all of which more fully appears by said order or decree, on file in this court, to which reference is made.

That your petitioners are injured and aggrieved by said order or decree, made October 22d, 1875, and reaffirmed January 14th, 1876, and elect to take an appeal therefrom to the Supreme Court of the United States. They also appeal from so much of said order or decree entered in the above-entitled case as limits their right to be a party in said suit to the right to appeal, as therein named, and to so much of said order or decree as requires your petitioners, if they desire said appeal to operate as a *supersedeas*, to give a bond in the sum of $1,000,000, within thirty days from January 14th, 1876.

Your petitioners aver that the action is to foreclose a railroad mortgage, which mortgage covers the entire property of the defendant, the Central Railroad Company of Iowa. The said railroad company is a bankrupt company, wholly unable to pay its debts; that said court has heretofore appointed its receiver, who is in possession of the entire property of said defendant, and is operating said railroad under and in pursuance of the orders of said Circuit Court.

That there are three mortgages upon the premises, all of which are being foreclosed; that your petitioners are *cestui que trust* of the complainant under the first mortgage; that none of the mortgages have any market or quotable value, except the first mortgage.

That the said first mortgage amounts in the aggregate to the sum of $3,700,000 at its par or face value; that its marketable or salable value does not exceed thirty-five per cent., or say $1,275,000; that sales have been made since the property has been in the hands of the court at twenty-seven and a half per cent.; that the earnings of the road will be applied by the court to the reduction of the amount due on the first mortgage, so that no party to said suit can suffer damages by reason of said appeal.

That the complainants in this case have given their written assent to your petitioners to take this appeal.

Wherefore your petitioners pray for an appeal to the Supreme Court of the United States from said orders and decrees of said Circuit Court, made on said twenty-second day of October, 1875, and on said fourteenth day of January, 1876, as above set forth.

They also ask that said appeal may supersede the execution of said orders or decrees.

Your petitioners herewith offer to your Honors a bond in due form of law, to be approved by you, and pray an allowance of a *supersedeas* appeal and a citation according to law, and your petitioners, as in duty bound, will ever pray.

(Signed) RUSSELL SAGE,
JAMES BUELL,
N. A. COWDREY.

NEW YORK, January 21st, 1876.

CITY AND STATE OF NEW YORK, *ss.*

Personally appeared before the undersigned authority, Russell Sage, James Buell, and N. A. Cowdrey, and each for himself made oath that the foregoing petition is true.

Before me, January 21st, 1876.

(Signed) JOHN A. SHIELDS,
[SEAL] *U. S. Commissioner S. D. of N. Y.*

The appeal prayed above is hereby allowed, and when the bond which I have approved is filed, it is to operate as a *supersedeas*.

(Signed) SAMUEL F. MILLER,
February 16th, 1876. *Judge.*

Endorsed—Circuit Court of the U. S. Farmers' Loan and Trust Company and others, complainants, *vs.* Central Railroad Company and others, defendants. Petition for an appeal. Filed February 21st, 1876. E. R. MASON, Clerk.

The Farmers' Loan and Trust Company, Complainant; Russell Sage, James Buell, and N. A. Cowdrey, Intervenors, Complainants,	Circuit Court of the United States, District of Iowa.
vs.	In Equity.
The Central Railroad Company of Iowa and others, Defendants.	No. 501.
	October Term, 1875.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, Russell Sage, James Buell, and N. A. Cowdrey, are held and firmly bound unto the clerk of the Circuit Court of the United States for the District of Iowa, in trust for the parties to the above-named suit, as their interest may appear, in the sum of $20,000, lawful money of the United States, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally.

The condition of this bond is such that, whereas, at a term of the Circuit Court of the United States for the District of Iowa, held on the second Monday of October, 1875, viz., October 22d, 1875, and on the fourteenth day of January, 1876, in the suit above named, depending in said court, in equity, a certain order or decree was made by said court, by which the intervenors in said case were injured and aggrieved, as more fully set forth in their petition, asking for an appeal from said orders and decrees.

And the said intervenors having asked for and obtained an appeal from said orders and decrees to the Supreme Court of the United States, and filed a copy thereof in the office of the Clerk of the Circuit Court of the District of Iowa, and a citation directed to each of the parties to said suit, citing them to appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October, 1876, having been duly issued and filed.

Now, therefore, if said intervenors, or either of them, shall prosecute said appeal to effect, and answer all damages and costs if said appeal is not made good, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals, at the city of New York, this twenty-first day of January, 1876.

RUSSELL SAGE, [SEAL]
JAMES BUELL, [SEAL]
N. A. COWDREY. [SEAL]

Approved by me to operate as a *supersedeas*, this sixteenth day of February, 1876.

SAMUEL F. MILLER,
Judge.

Farmers' Loan and Trust Co., Complainant, Russell Sage, James Buell, and N. A. Cowdrey, Intervenors, Complainants,

vs.

The Central Railroad of Iowa and others, Defendants.

Supreme Court of the United States.

OPINION OF ASSOCIATE JUSTICE MILLER UPON APPLICATION TO VACATE APPEAL BOND.

Sur application of H. J. Boardman, chairman of Boston committee of bondholders of Central Railroad of Iowa, to Hon. Samuel F. Miller, Associate Justice Supreme Court, March 7th, 1876, to vacate appeal bond.

HON. HENRY W. PAINE,
HON. J. H. B. LATROBE,
R. L. ASHHURST,
Counsel for Applicants.
N. A. COWDREY,
For Opponents.

OPINION AND JUDGMENT.

In the matter of the application to me at chambers to set aside the order heretofore made by me allowing an appeal to operate as a *supersedeas*, after a full hearing and mature consideration, I overrule the motion.

1. The only ground which goes to the merits on which the motion is founded is, that the sum of $20,000, the amount of the bond approved, is entirely too small to justify a *supersedeas*. Of the sufficiency of the bond, as to amount, I have no doubt.

The whole of this subject was reviewed in the case of Jerome *vs.* McCarter, 21 Wall, 17. The spirit of that decision, and the intent of all the statutes on the subject, is that in case of a foreclosure of a mortgage, or of any judgment for the sale of the property, where that is the principal matter, the bond necessary to appeal with *supersedeas* shall be sufficient to secure costs of suit and such loss by delay as might be reasonably anticipated.

Interest on the debt is not the only criterion, for the debt may be ten times the value of the property; and when the plaintiff could only get the property and no more under the decree, the true criterion is such rent or net proceeds for the use of the property as would fairly accrue to plaintiff pending the litigation.

This is already secured to plaintiff in this case by the fact that the road is in the hands of the court by its receiver, and all it earns pending the appeal, above its necessary expenses, will go to plaintiffs on their debt and interest coupons.

I am reminded that Judges Dillon and Love, who granted the first appeal, required a bond of $1,000,000. They may be of a different opinion from mine, as to what would be the measure of damages on such a bond, and no doubt they thought such a bond necessary; but with my views of the matter I am very clear that $20,000 is sufficient, and if I had any right to act in the matter at all, I am quite satisfied with that action.

EXHIBIT E.

Russell Sage, James Buell and N. A. Cowdrey, Intervenors, Appellants,	Supreme Court of the United States.
vs.	October Term, 1876.
The Central Railroad Company of Iowa et al.	No. 731.
	Appeal from the Circuit Court of the United States for the District of Iowa.

ON MOTION.

Mr. Chief Justice WAITE, delivered the opinion of the Court.

The Farmers' Loan and Trust Company, trustee for the bondholders secured by a mortgage of the Central Railroad Company of Iowa, whose claims amounted in the aggregate to $3,700,000 exclusive of interest, commenced a suit in the Circuit Court of the United States for the District of Iowa, October 14, 1874, to foreclose the mortgage for the benefit of all parties interested in the security.

This was done at the request of a large number of the bondholders and after much consultation between them in regard to their common interests. After the cause had been pending for nearly a year, and at some time between October 1 and October 22, 1875, Russell Sage, F. Leake, James Buell, and Edwin Parsons presented a communication to the trustee, a copy of which is as follows:—

"*To the Farmers' Loan and Trust Company, Trustee, &c., First Mortgage Bondholders.*

"GENTLEMEN:—We are informed by your counsel, Grant and Smith, that they will ask the court, in the foreclosure suit now pending, to enter such decree as the majority of the bondholders

desire. Believing that some of the bondholders have other interests to serve than to protect the first mortgage bondholders, and that large numbers of the bondholders, from want of proper information, have been induced to sign various requests to the court for certain forms of decree injurious to us as bondholders, and being your *cestui que trust* to the amount set opposite our names of the first mortgage bonds, to secure the payment of which you hold the mortgage as trustee for ourselves and others similarly situated, this is to notify you of such interest on our part, and to request you to instruct your counsel to procure the ordinary decree of foreclosure and sale, and, failing to get this from the court, to take an appeal to the Supreme Court of the United States.

"If for any reason you decline to give your counsel such instructions, please inform us, that we may become a party to said proceedings, and take such course as we may be advised in the matter. We understood the trust deed to require you to procure the ordinary decree of foreclosure and sale. If the bondholders, or a majority of them, request you to purchase the mortgaged premises and to form a new company, that it is competent for you to do so, upon such terms and conditions as a majority of the bondholders desire. But until you do so purchase you are to do all you reasonably can be expected to do to protect the minority as well as the majority of your *cestui que trust.*

"Respectfully your obedient servants,

"RUSSELL SAGE, $100,000.
"F. LEAKE, by Russell Sage, $25,000.
"JAMES BUELL, $10,000.
"EDWIN PARSONS, $13,500.

"New York, October 1st, 1875."

A term of the Court commenced October 11, 1875, and on the 22d of that month The Farmers' Loan and Trust Company, The Central Railroad Company of Iowa, and all the other defendants, together with committees of various bondholders,

represented by their respective attorneys, appeared in court and agreed to the form of a decree to be entered in the cause, the same having been the result of consultation and compromise among the parties in interest. At the same time The Farmers' Loan and Trust Company exhibited to the court the communication it had received from Sage and his associates, accompanied by a statement that Buell had deposited with it as trustee $10,000 of bonds secured by the mortgage, Leake $25,000, and Sage $100,000, and that it was ready to execute any decree which might be made by the court under the circumstances. The court thereupon, without considering the rights and interests of the various parties, entered, October 22, 1875, the decree agreed upon, and then adjourned until some time in January, 1876.

Down to this time neither Sage nor any of his associates had asked to be made parties to the suit or to be permitted to intervene in any manner for the protection of their interests, but December 16, 1875, Sage, Buell, and N. A. Cowdrey presented to the circuit judge at St. Paul, Minnesota, the Iowa Circuit Court not being then in session, a petition, as follows:—

"Now comes The Farmers' Loan and Trust Company, as trustees in said cause for Russell Sage, James Buell, and N. A. Cowdrey and plaintiff in said cause, and prays of that court that an appeal may be allowed to said plaintiff, and tenders to the court an appeal bond, with a request that the same may operate as a *supersedeas*" (signed Farmers' Loan and Trust Company, by Grant and Smith, solicitors).

Upon this petition the circuit judge entered his order, as follows:

"In this case an appeal is asked by the complainant so far, and only so far, as it affects the interests of Russell Sage, James Buell, and N. A. Cowdrey.

"I deny the appeal prayed for, because—

"1. The decree in question was entered by consent of all the parties in interest.

("The term at which this decree was rendered has not yet

ended, but stands adjourned until in January next, and the proper course for the parties in whose behalf an appeal is sought is for them to appear, and if the decree is erroneously entered or is improper, to apply to be made parties or to have the decree corrected or a new decree entered.)

"2. An appeal cannot be taken on behalf of certain bondholders not parties to the record, leaving the rest of the decree unappealed from. As the trustees (complainants) do not ask for an appeal from the whole decree, I need not consider when they would be justified in a case where there are several millions of dollars of bondholders who acquiesce in the decree, to appeal at the instance of three bondholders who only claim to hold bonds to the extent of $200,000.

"3. If an appeal could be allowed as asked for, the bond offered is insufficient as to amount to secure cost, damages for delay, costs and interests on the appeal. The clerk will enter the above order of record, denying the appeal prayed for.

"(Signed) JOHN F. DILLON,
Circuit Judge.

"At Chambers, St. Paul, December 16, 1875."

The court met pursuant to adjournment, and January 11, Sage, Buell, and Cowdrey, claiming to be the owners of $200,000 of the bonds secured by the mortgage, filed their petition for leave to intervene in the suit as plaintiffs or defendants, to the end that they might have opportunity to protect the interests they had in common with the other holders of bonds, and with liberty to appeal to this court. January 13, they filed a motion to set aside the decree of October 22.

On the next day, January 14, the cause came on for hearing upon the motion filed January 13, the petition filed January 11, and the petition presented to the circuit judge, December 16, with his order thereon. The motion to set aside the decree was

denied, and as to the other petition the following order was made:—

"Upon consideration of the premises, it is now by the court ordered that Sage, Buell, and Cowdrey, be and they are hereby permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their said several interests therein, and in their own names, an appeal to the Supreme Court from the decree entered herein on the twenty-second day of October, 1875, and if said Sage, Buell, and Cowdrey desire said appeal to operate as a *supersedeas*, the bond for that purpose is fixed at the sum of $1,000,000, to be given in thirty days from this date, and if so given said appeal shall be regarded as taken and perfected on the sixteenth day of December, 1875, the said parties having then applied as aforesaid for said appeal, and having delayed the same until this time by order of the judge at chambers, as above shown; but if said appeal is not to operate as a *supersedeas* the bond is fixed at the sum of $2000."

No bond was executed under the authority of this order, and February 16, 1876, a petition for the allowance of an appeal from the orders and decrees of October 22 and January 14, to operate as a *supersedeas*, was presented to Mr. Justice Miller, the justice of this court assigned to the eighth circuit, in which the district of Iowa is situated, and he allowed the appeal as prayed for and accepted a *supersedeas* bond in the sum of $20,000. In due time the transcript of the record was filed in this court and the appeal docketed.

The Farmers' Loan and Trust Company, represented by a joint commitee of the bondholders, now move—

1. To vacate the *supersedeas*; and—

2. To dismiss the appeal.

1. As to the *supersedeas*.

In Kitchen *vs.* Randolph, decided at the present term, we held that it was not within the power of a justice of this court to grant a *supersedeas* on a writ of error or upon an appeal unless the writ of error was sued out and served or the appeal taken

within sixty days, Sundays exclusive, after the rendition of the judgment or decree complained of.

The decree in this case was rendered October 22, 1875. At that time, the present appellants were not parties to the suit, and consequently could not appeal. The application of December 16, though made in their interest, was in form by The Farmers' Loan and Trust Company. This application was denied, and properly so, because an appeal was only asked so far as it affected the interests of these appellants. The trustee represents all the bondholders, and as the decree is indivisible, it must appeal for the whole, or none. No application was then made by the appellants for leave to intervene and become parties, and consequently the court could not then have been asked to allow them an appeal as parties. Such an application was, however, made January 11, and January 14 they were admitted as parties or the purpose of appealing. An appeal was then allowed to them, but they did not avail themselves of it either by giving a *supersedeas* bond or a bond for costs. And if they had done so, it could not have had the effect of a *supersedeas*, because it was not allowed until after the expiration of the sixty days. The order of the court to the effect that if the bond should be given the appeal might be regarded as taken and perfected December 16, was of no effect for the purposes of a *supersedeas*. While it is true that the court may enter an order in a cause *nunc pro tunc*, where the action asked for has been delayed by or for the convenience of the court (Perry *vs.* Wilson 7 Mass., 394), it is never done where the parties themselves, have been at fault (The Fishmongers' Company *vs.* Robertson, 3 Man., Gr. & S., 974), or where it will work injustice.

A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with.—(Hogan *vs.* Ross, 11 How., 297; R. R. Co. *vs.* Harris, 7 Wall., 575.) Time is an essential element in the proceeding and one which neither the court nor the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this

means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law. The court can no more give effect to a *supersedeas* by ordering that the appeal shall relate back to a time within the sixty days, than it can to an appeal taken after the expiration of two years by dating it back to a time within the limitation. To make a *nunc pro tunc* order effectual for such purposes, it must appear that the delay was the act of the court and not of the parties, and that injustice will not be done.

A slight examination of the facts in this case will be sufficient to show that the failure to take this appeal in time is attributable entirely to the parties. They knew, more than twenty days previous to the entry of the decree, that there was a conflict of interest between them and a large majority of the bondholders, and that the trustee had been asked to have a decree entered such as those opposed to them desired. Instead of seeking to be made parties to the suit at that time or during the first eleven days of the term and before the decree was entered, they contented themselves with a notice to the trustee and a demand upon it to procure such a decree as they required, and if that could not be done, to appeal. This, too, when they knew that they had only $200,000 out of $3,700,000 of the secured bonds. After the decree was entered, they delayed any application to the court for leave to intervene for the protection of their own interest until after an adjournment to a remote day had taken place. Then delaying, until near the expiration of the sixty days, they caused the trustee to apply for leave to appeal so far as their interests were affected, when it must have been apparent that such an order could not have been made. Even then they filed no application to be made parties so that they might appeal for themselves, but delayed all action in that behalf until long after the time when a *supersedeas* could be had as a matter of right. All this was the act of the parties and not of the court.

It is claimed, however, that the motion filed by the appellants January 13, to set aside the decree, operated to suspend the decree, and that under the authority of Brockett *vs.* Brockett, 2

How., 238, they had until sixty days after their motion was denied to perfect an appeal and obtain a *supersedeas*. But there is an essential difference between that case and this. In that the motion was made by parties to the suit. The motion was one that could be made without leave, and it was entertained. The cause was referred to a master upon this motion. Under such circumstances the court held that the decree did not become final until the motion for rehearing was decided. Here, however, the movers were not parties to the suit. They had no right to intervene except upon leave, and this was refused. Under such circumstances it is clear that the decree was not suspended in whole or in part by their motion. The appellants were permitted to intervene, but only for the purpose of an appeal. It would have been within the power of the court to set aside the old decree and enter it over again, but this was refused. Leave only was granted to appeal from the decree as originally rendered.

No *supersedeas* can follow from the appeal allowed by Mr. Justice Miller, because that clearly took effect after the expiration of the sixty days from the date of the decree. Neither can the order of the same justice have the effect of the allowance of a *supersedeas* on the original appeal, because, as has already been shown, that appeal was not taken in time.

From this it follows that the motion to vacate the *supersedeas* must be granted.

2. As to the appeal.

The appellants, by the order of January 14, became parties to the suit for the purposes of an appeal. This order, having been made at the same term in which the decree was entered, was within the power of the court, and although it does not appear whether they were admitted as plaintiffs or defendants, it was sufficient to enable them to prosecute an appeal for the protection of their interests. Under this authority their appeal has been allowed and perfected. Whether this brings up the whole of the case or only a part, it is not necessary now to consider. It is clear that these parties have been allowed their appeal and

that the case is here to the extent that is necessary for the protection of their interests. It is their separate appeal within the rule, as to the form in which a severance may be obtained, which is laid down in Masterson *vs.* Herndon, 10 Wall., 418. The motion to dismiss the appeal is, therefore, denied.

Both the appellants and the appellees ask to have the cause advanced for a hearing, but as only private interests are involved we see no reason why it should have preference over other suits upon the docket. This motion is also denied.

Mr. Justice MILLER dissenting.

I dissent from this opinion.

I think the circuit court, under the circumstances of the case, had a right to treat the application of appellants for appeal as having been made when they asked liberty to use the name of their trustee for that purpose, and it was rightfully allowed by the circuit court as of that date. If this be so, it is not denied that the bond approved by me would operate as a *supersedeas.*

Mr. Justice FIELD agrees with me.

True copy.

Attest: D. W. MIDDLETON,

[SEAL] *C. S. C. U. S.*

Russell Sage et al., *Intervenors, Appellants,*	Supreme Court of the United States.
vs.	No. 731.
The Central Railroad Company of Iowa et al.	October Term, 1876.

On consideration of the motion to vacate the *supersedeas* in this cause, and of the argument of counsel thereupon had, as well in support of as against the same, it is now here ordered by the Court that said motion be, and the same is hereby granted.

18th December, 1876.

I, D. W. Middleton, Clerk of the Supreme Court of the United States, do hereby certify that the above is a true copy of the order entered in the above-entitled cause on the motion to vacate the *supersedeas.*

In Testimony Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court at the City of Washington this 23d day of January, A. D. 1877.

[SEAL]

D. W. MIDDLETON,
Clerk Supreme Court U. S.

CITY AND COUNTY OF NEW YORK, *ss.*

William T. Byrnes being duly sworn says:—

That on the 26th day of January 1877, I served order of vacating *supersedeas*, of which within is a copy, on Mr. Turner of 20 Nassau street, New York City, personally at his office by leaving the same with him.

WILLIAM T. BYRNES.

Sworn to before me this 26th day of January 1877.

CECIL CAMPBELL HIGGINS,
Notary Public N. Y. County.

EXHIBITS F 1 AND F 2.

KEOKUK, Jan'y 22, 1877.

DEAR JUDGE:—Yours of the 20th recived. It seems to me that the case to which you refer now stands just as if there had been no *supersedeas* and that whatever the court could have ordered if there had been no *supersedeas* it may now order without a *procedendo*, I presume the court above would not interfere with the discretion of the court below in the execution of its judgment and decrees except in a proper case by Mandamus and therefore that a *procedendo* would not be the appropriate writ in a case like this. To your first question therefore I answer I do not think a *procedendo* necessary.

To the second I say that I certainly would make no order on any such application as Judge C—— presents. There seems to be no necessity for any great haste and certainly none is shown. Further in my opinion the trustees are the proper parties to move in such an order and I understood you to say that Judge C—— does not represent them.

As you say the appeal being retained it might possibly complicate the matter to make an order on the Trustee to sell. This as at all events is worthy of grave consideration and I certainly think the Trustees ought to be heard if their discretion respecting the sale is to be interfered with.

Yours truly,

(Signed) J. M. LOVE.

L. M. FISHER, ESQ.,
Special Master.

I concur in these views of Judge Love and send you this for your guidance in the matter which you are at liberty to communicate to Judge Cole the Trustee or any person interested.

(Signed) JOHN F. DILLON.

Jan'y 25th, 1877.

EXHIBITS G 1 AND G 2.

(*Copy.*)

DES MOINES, Feb'y 9th, 1877.

Lewis M. Fisher, Esq., Davenport, Iowa,

MY DEAR SIR:—I enclose to you, as the Master appointed to make sale of the Central Railroad, under the decree entered October 22d, 187 a copy of a motion this day filed in the Clerk's office of the U. S. Circuit Court, asking a Writ of Attachment against you, because of your failure to perform the duty of sale of said road in said decree specified. An application will be made to the Clerk on next Tuesday morning, the 13th inst., to issue the attachment under Equity Rule 8, 9, and 10. And in case the Clerk shall refuse to issue such writ, an application will be made to the Judge at Chambers, at the March rules, for an order for the issuance of such attachment.

This paper is filed pursuant to instructions by the Solicitors whose names are annexed thereto, and I suppose they are determined to press it to the utmost. I ask that you will please notify me by letter of the receipt of the enclosed papers, and of your acceptance of the due service thereof upon you, and oblige

Very truly yours,

(Signed) C. C. COLE.

(ENDORSED.)—The Farmers' Loan and Trust Company *vs.* The Central Railroad Co. of Iowa. Proof of Service of notice of application for Writ of Attachment against the Master. Filed Feb'y 13, 1877. E. R. Mason, *Clerk.*

DAVENPORT, Feb'y 10, 1877.

Hon. C. C. Cole, Des Moines, Ia.,

MY DEAR SIR:—Your favor of the 9th and also copy of affidavit and motion for my attachment for failure to sell Cent. R. R. of Iowa, duly received and accept service of the motion

of Messrs. Latrobe, Ashhurst and others and also of the affidavit of Mr. Alexander: I hope you will not delay the hearing of the matter, as I do not wish to have the threat of an attachment hanging over my head longer than absolutely necessary.

Please apply to the Court at the earliest possible day if attachment refused by Clerk.

Very respectfully,

(Sgd.) L. M. FISHER.

EXHIBIT H.

Folio 1.]

The Farmers' Loan and Trust Company

vs.

The Central Railroad Company of Iowa et al.

United States Circuit Court for the District of Iowa.

TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA:

The petition of The Farmers' Loan and Trust Company, complainant herein, respectfully shows to the Court:—

I. That it is Trustee under the mortgage of the defendant 2] Railroad Company, and complainant in this suit of foreclosure, in which a decree was entered at the October Term, 1875.

II. That an appeal from the said decree to the Supreme Court of the United States was taken by a minority of bondholders, who obtained a *supersedeas*.

III. That your petitioner was served on the 26th day of January, 1877, with an order of the Supreme Court vacating the *supersedeas*, a copy of which is hereto annexed, marked

3] Schedule A, forming part of this petition, but that the appeal remains in full force, and that the suit is still on the docket of the Supreme Court.

IV. That your petitioner, on the 3d day of February, 1877, received from persons purporting to represent bonds to the amount of $331,000, among whom are the appellants, a request and protest, urging it not to execute the decree, a copy of which 4] request and protest is hereto annexed, marked Schedule B, forming part of the petition.

V. That your petitioner, on the 5th day of February, 1877, received from Mr. R. L. Ashhurst, Chairman of committees of first and second mortgage bondholders, a request, notice and requisition to proceed at once to execute the decree, a copy of which request, notice and requisition is hereto annexed, marked Schedule C, forming part of this petition.

5] VI. That the said Chairman of the committes of bondholders claims to represent, in demanding a sale, the wishes of the holders of a majority of the first mortgage bonds; that your petitioner has no knowledge as to whether such majority has been personally consulted, and their wishes in that regard ascertained; and that as your petitioner believes, the holders of first mortgage bonds representing a par value of about one million dollars, have not been heard from at all during the progress of 6] this suit, and their names and residences are unknown.

VII. That except as aforesaid your petitioner has no knowledge or information as to the desires and wishes of the bondholders, or others interested in said railroad, as to the subject-matter of this petition.

VIII. That by the decree in this suit on file in this Court, this Court directed your petitioner to bid at the sale of the mortgaged property, as Trustee, at least the amount of principal 7] and interest of the first mortgage bonds, and that by the mortgage it is provided that in such case the Trustee may take

measures to organize a new company to receive a conveyance of the property from the purchasing Trustee.

IX. That no money or indemnity has been paid, given, offered or promised to your petitioner to pay the expenses of the foreclosure, or of any proceedings connected therewith, or of such sale and reorganization, and that your petitioner has no 8] funds belonging to the trust estate in its possession or subject to its control from which any such expenses could be defrayed. That the actual outlays and disbursements already necessarily expended by the petitioner and its counsel in connection with this suit amount to a very considerable sum, beyond counsel-fees and Trustee's compensation, for none of which has your petitioner any indemnity. That the amount specified by the Special Master, to whom the matter was referred, in the report to the Court, as a proper compensation for the costs, fees and expenses of the 9] petitioner, was so fixed upon, as the petitioner believes, without full evidence and due consideration of the subject, and without taking into consideration the duties and obligations imposed on the petitioner under the present circumstances, and under the proposed rule, and that the said Report has been excepted to by many of the parties to the suit, and also by the Bondholders' Committee, and the exceptions are now before the Court for its future action.

X. That the petitioner has made efforts to accommodate and 10] settle the difficulties and disagreements existing between the boudholders of this road, and to that end appeared by counsel twice in the Supreme Court of the United States. That on the first occasion, on the 6th day of November, 1876, an interview was had at Washington between Mr. N. A. Cowdrey, as representing the appellants, Mr. R. L. Ashhurst, as representing the Bondholders' Committee, Mr. H. B. Turner, as representing your petitioner, and Mr. Isaac M. Cate, the President of the Railroad. That at that interview, after considerable interchange 11] of views, a modified form of decree was agreed upon by all the parties, which was presented to the Supreme Court, and

which his Honor, the Chief Justice suggested might be engrossed and presented to the Court for entry on the next motion day, with the consents of all the said Counsel endorsed thereon; but that subsequently some party or parties, other than your petitioners' Counsel, failed to consent thereto.

XI. That subsequently your petitioner was requested by the appellants to file a motion in the Supreme Court to advance the 12] cause on the docket, and in accordance with such request your petitioner presented such motions by counsel in said Court on the 27th day of November, 1876; but the said motion was denied.

XII. That afterwards your petitioner endeavored to effect an arrangement by which the suit might be disposed of by being submitted on printed brief, and thus decided at an early date out of its order, in accordance with the rules of the Supreme Court; 13] that the appellants suggested such course and acceded thereto, but that the Chairman of the bondholders' committee, Mr. Ashhurst informed your petitioner's counsel by letter that he did not deem it consistent with his duty to consent to the proposition.

XIII. That your petitioner is advised by counsel that it is not improbable that the appellants may succeed in their appeal, when the same comes on to be heard in the Supreme Court. That the principle of the decree was condemned in 1875, in a 14] written communication from Messrs. Ashhurst and Latrobe, as Chairmen representing committees of first and second mortgage bondholders, to your petitioner, in the following words:—

"The power of purchase contained in the mortgage by which the title is to vest in a new Company, &c., and the bondholders are, under certain contingencies, allowed only to claim their proportionate interest in said Company, applies only to a sale made for the benefit of first mortgage bondholders exclusively. Under 15] this power the foreclosure must be for them alone, and every subordinate interest must be destroyed."

XIV. That so far as the personal wishes of the petitioner and its officers are concerned, they are to pursue such course as it legally can for effecting, as speedily as possible, a final and satisfactory reorganization of the railroad for the benefit of its *cestuis que trust.* That it has personally no interest of any kind or description in the railroad, or any of its debts or securities, nor, 16] so far as the President of your petitioner is informed and believes, is there any one of its officers, trustees, counsel, employees or stockholders who has any such interest, actual, remote or contingent.

XV. That your petitioner is advised that certain grave difficulties would be encountered in an attempt to execute the decree pending the appeal, some of which are the following:—

If the decree should be reversed in the Supreme Court, the sale would be invalid, and would be annulled. This fact would prevent harmonious action by the bondholders, and might 17] subject the trustee to censure by such of them as do not approve of the decree, and be extremely injurious to those of them who do not approve of the scheme of reorganization provided for in the decree.

If the sale should be made and new securities be provided for those interested in the road, to be received by them on their payment of their *pro rata* share of the expenses, the practical result would be that bondholders would not take up these securities (which would not be salable, being subject, as to their validity, 18] to the final action of the Supreme Court,) until such action. The first mortgage bondholders would undoubtedly reason that it was useless to pay such *pro rata* share, with the certainty of its not being refunded to them in any case, for the privilege of receiving doubtful securities for those of undoubted validity.

The sale if made and followed by the reorganization of the Company, would involve a very considerable expenditure, which would be thrown away if the decree is reversed, and the trust fund would thus be subjected to greatly additional charges, to 19] the prejudice of the bondholders.

Wherefore, under the circumstances above mentioned, the trustee, being desirous of acting under the advice and protection of this Honorable Court, and following such instructions as the Court may think most conducive to the best interests of all parties concerned, prays that it may have the instruction of the Court in the premises.

And your petitioner, as in duty bound, will ever pray, etc.

The Farmers' Loan and Trust Co. by

R. G. RALSTON,
Pres.

H. B. TURNER,
Of Counsel.

20] UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF NEW YORK, } *ss.*

At New York, in the County of New York, in said District, the eighth day of February, A. D. 1877, personally appeared Rosewell G. Ralston, who signs the foregoing petition, and made oath that he is President of the petitioner, that he has read the said petition, and understands the same and the contents thereof; and that all the matters therein stated as of the knowledge of the petitioner, are to his knowledge true, and as to all other matters therein contained, he verily believes them to be true.

Before me,

W. D. SEARLS,
[SEAL] *Notary Public, New York County.*

SCHEDULE A.

Russell Sage et al., *Interveners, Appellants,*
vs.
The Central Railroad Company of Iowa et al.

In the Supreme Court of the United States.

No. 731.

October Term, 1876.

On consideration of the motion to vacate the *supersedeas* in this cause and of the argument of counsel thereupon had, as well in support of as against the same, it is now here ordered by the Court that said motion be, and the same is hereby granted.

18th December, 1876.

I, D. W. Middleton, Clerk of the Supreme Court of the United States, do hereby certify that the above is a true copy of the order entered in the above-entitled cause on the motion to vacate the *supersedeas.*

In Testimony Whereof I hereunto subscribe my name and affix the seal of said Supreme Court at the City of Washington this 23d day of January, A. D. 1877.

D. W. MIDDLETON,
Clerk Supreme Court U. S.

SCHEDULE B.

Farmers' Loan and Trust Co.
vs.
Central Railroad of Iowa.

To the Farmers' Loan and Trust Company,

GENTLEMEN:—The undersigned holders and owners of First Mortgage Bonds of the Central R. R. of which you are the

Trustee to the amount set opposite to our respective names respectfully represent to you—

That they have heard it rumored that you as complainant in the above-entitled case had been requested to sell the Road in pursuance of a Decree entered in October, 1876 notwithstanding an appeal had been taken to the Supreme Court of the United States from the order of the Court making said Decree, which appeal is now pending. The undersigned are advised that there is no resonable doubt but that said Decree will be reversed by the Supreme Court, and if they are correctly informed Judge Grant one of your own Counsel is of that opinion. All professional advice which they have sought and obtained concur in the belief that the Decree will be reversed when the case is tried.

A sale of the premises made under a decree that will be reversed complicates the title, depreciates the property in market value and adds materially to claims for costs and allowances against the property, and plainly results in the appellants in the former case taking another appeal from the confirmation of the sale or other orders which they deem improper to be made while appeal is pending.

Thus we as bondholders could gain nothing by this sale but will be embarrassed as above shown and by the locking up of our Bonds from the time they are paid into Court until the second appeal is determined. For the reasons above given and others which might be given they are opposed to the sale of the Road until the Circuit Court receives the mandate of the Supreme Court on that subject and protest against said sale being made and respectfully request you as their Trustee and agent to do all you reasonably can to prevent the sale of said premises—until the mandate of the Supreme Court is received in this case.

The undersigned desire to expedite a final hearing on said appeal and to that end they request you to try to have the cause submitted on printed Briefs under the rules of the Court. They are assured that the Appellants desire so to do.

New York, January 25, 1877.

F. P. James, thirty-two thousand, ...	$32,000
Edwin Parsons, thirteen thousand five hundred, .	13,500

1877.

Jan. 26th.	Geo. B. Carhart by A. L. Hatch att'y, ten thousand, ...	$10,000
" "	F. H. Wolcott Trustee, by A. L. Hatch att'y, ten thousand, ...	10,000
" "	James Willits, by A. L. Hatch att'y, two thousand, ...	2,000
" "	C. A. Van Kleeck by A. L. Hatch att'y, three thousand, ...	3,000
" "	John W. Curtis by A. L. Hatch att'y, two thousand, ...	2,000
" "	Chas. H. Glackmeyer by A. L. Hatch att'y, fifteen hundred, ...	1,500
" "	Caroline M. Willard by A. L. Hatch att'y, fifteen hundred, ...	1,500
" "	Harriet W. Barrows by A. L. Hatch, one thousand, ...	1,000
" "	D. A. Taylor Ex. by A. L. Hatch att'y, one thousand, ...	1,000
" "	Morgan Washburn by A. L. Hatch att'y, two thousand, ...	2,000
" "	W. H. & E. Lyons by A. L. Hatch att'y, three thousand, ...	3,000
" "	C. Newell by A. L. Hatch att'y, five hundred, ...	500
" "	Sarah Willard, by A. L. Hatch att'y, five hundred, ...	500
" "	Sidney Tucker by A. L. Hatch att'y, five hundred, ...	500
" "	Asahel Peirce, by A. L. Hatch att'y, one thousand, ...	1,000
" "	Jane A. Webber by A. L. Hatch att'y, five hundred, ...	500
" "	A. E. Bacon by A. L. Hatch att'y, five hundred, ...	500
" "	James Buell, twenty-five thousand dollars,	25,000
Russell Sage for himself and others in trust, two hundred and fifty thousand, ...		250,000

SCHEDULE C.

To the Farmers' Loan and Trust Company, Trustees of Mortgage Bonds of the Central Railroad Company of Iowa and Complainants in suit:

The Farmers' Loan and Trust Company, Complainants, vs. *The Central Railroad Company of Iowa* et al., *Defendants.*	Circuit Court U. S. District of Iowa.

On behalf of the First and Second Mortgage Bondholders of the Central Railroad of Iowa and of the combined committees of such Bondholders of whom I am chairman, I hereby request notify and require you as the Trustees of such mortgages and complainants in said suit to proceed at once to carry out execute and put into effect the decree of the Circuit Court of the United States for the District of Iowa entered the 22d day of October A. D. 1875, and give directions to the Master to that end, which now remains in full force and virtue, the order superseding the execution thereof having been duly vacated.

Yours respectfully

R. L. ASHHURST,

Chairman of Committees First and Second Mortgage Bondholders on this behalf and for Bondholders whom they represent.

In the Circuit Court of the United States for the District of Iowa.

FARMERS' LOAN AND TRUST COMPANY

vs.

CENTRAL R. R. CO. OF IOWA *et al.*

To the Honorable the Judges of said Court:

The answer of Richard L. Ashhurst, of Philadelphia, Henry J. Boardman, Charles Alexander, and A. V. Lynde of Boston, Thomas B. Reed of Portland, John H. B. Latrobe of Baltimore, Edmund Wetmore, Peter Starr, and George T. M. Davis of New York, combined Committees of first and second mortgage bondholders, and of Thomas Kelso, Isaac Hyde Jr., Henry N. Jones, Thomas Kensett, John J. Hanson, Charles Alexander, Charles A. Gilson, Edwin M. Lewis trustee of the Estate of Jay Cooke & Co.; Henry G. Timmons, Joseph Wentworth, Edward Fox, John W. Randall, A. Z. Brown, Home for Homeless, York County Savings Bank, Biddeford Savings Bank, Kennebunk Savings Bank, and Maine Historical Society, holders of first mortgage bonds of said Central Railroad of Iowa acting for themselves and others to the petition of the Farmers' Loan and Trust Company respectfully sets forth:

I. II. III. Your respondents admit the truth of the first three paragraphs of the said petition as therein set forth.

IV. As to the IVth paragraph of said petition, your respondents, while they have no knowledge as to the request and protest therein mentioned to have been received against the execution of

the decree, have no reason to doubt the receipt of such a paper, and are satisfied to admit for the purposes of this proceeding that such a protest and request was received as therein set forth. But these respondents say that this notice and request as it appears upon its face, is made and presented by the appellants in this suit. That these appellants were by the order of this Honorable Court, made January 14, 1876 admitted to be parties in the suit for the sake of taking care of their own rights in the premises and to prosecute the appeal in their own names. That they prosecuted an appeal accordingly from the decree heretofore entered; that they failed, however, to comply with the order of your Honorable Court as to giving a bond in the sum of One Million of Dollars in order to secure the writ of *supersedeas* as ordered by the provisions of the order of this Court of January 14, 1876.

That notwithstanding such failure the said interveners obtained an order of *supersedeas* from Mr. Justice Miller on the 16th day of February, 1876, by which for a number of months they obstructed and prevented the execution of this decree. As is correctly set forth in the third paragraph of this petition, the said order of *supersedeas* was set aside by the Supreme Court of the United States and totally vacated as irregular and void on the day of December, 1876, since which vacation of the writ of *supersedeas*, said decree remains notwithstanding the pendency of said appeal in full force and virtue, and the attempt of the said interveners by notice, protest or request to the said petitioner to further obstruct the execution of the said decree is contrary to law and equity, and amounts to an attempt to secure in pays what they have failed to secure by their *laches* in adopting proper legal proceedings.

That having been admitted at their own request to conduct proceedings for themselves, whatever rights they may have in the premises, said interveners have no legal or moral right further to interfere with the execution by your petitioner of the trust reposed in it, and the said request and protest of the appellants and interveners should be disregarded.

V. As to the Vth paragraph of said petition, they admit and aver that the petitioner did receive from the Chairman of said first and second mortgage bondholders a request, notice and requisition, as therein mentioned, which was given to the petitioner by the said Chairman in fulfillment of the duty and powers reposed in him by the said Committees and by the said bondholders, with which request, notice and requisition your respondents aver and charge that it is the duty of the petitioner to at once comply.

VI. VII. As to the VIth and VIIth paragraphs of said petition, your respondents aver that the report of L. M. Fisher, Esq., Master, and the consents of bondholders filed in this case satisfactorily show that the said notice is given by the authority and to effect the wish and desire of a majority of the first mortgage bondholders, and your respondents also aver that by the decree itself it is recited that the same was made, as was the case, in accordance with the wishes and request of such majority of first mortgage bondholders, and since the said decree your respondents have obtained further ratification and approval thereof by a majority of the first mortgage bondholders and a request that the same should be put into execution, and an authorization to the Chairman of said combined Committees on their behalf to take all measures that were necessary to carry the said decree into execution.

VIII. As to the VIIIth paragraph of said petition, your respondents admit the truth thereof as therein stated, and they further add that a majority of the first mortgage bondholders have since said decree authorized and instructed the said Committees and their Chairman to take measures to organize the Company to receive conveyance of the property from the purchasing Trustee which they are ready at once to do.

IX. As to the IXth paragraph of said petition, your respondents say that while it be true that no money or indemnity has been yet paid or given to the petitioner for the expenses of the

foreclosure, they have no desire to do anything but what is equitable and just in the matter, and are ready and willing to do what may be just and proper to meet the views of the petitioner so far as approved by this court, and to do what may be just and equitable in the premises, and they trust that a satisfactory understanding on the subject of compensation costs and fees will be arrived at and all difficulty on that question removed.

X. As to the Xth paragraph of said petition, your respondents say that it is true that negotiations took place for a settlement of the controversies between the different parties, and that at one time it seemed likely that an agreement might be arrived at by which the decree in question might have been modified so as to meet the views of the interveners appellants as well as of these respondents, but when the amended decree came to be written out in full, greater difficulties and differences were shown to exist than had been previously recognized, by reason of which and for other causes it was found impossible to reconcile the differences between the parties. All this, however, is irrelevant to any question now involved as being merely an abortive effort at an agreement, which having failed it is immaterial and unprofitable to recriminate as to who may or may not have been at fault in the matter. These respondents admit, however, that no blame is to be attached to the petitioner for the failure of the negotiations for agreement.

XI. As to the XIth paragraph of said petition your respondents admit that your petitioner made the motion, as requested, in which application your respondents heartily united. The Supreme Court, however, declined to grant the application on the ground that as only matters of private interest were involved, there was no reason that this cause should be advanced beyond others.

XII. As to the XIIth paragraph of said petition your respondents say that in view of the importance of the matters involved in the decree and the novelty of some of the principles, and the

necessity of a thorough presentation thereof to the appellate Court they have not deemed it to be fair to the Court which entered the decree or to the bondholders interested in carrying it out to submit the same on printed briefs without an oral argument. While they are confident of upholding and sustaining the decree when it is fully and intelligently explained and the reason therefor and the principles guiding it brought to the attention of the Court above, yet being as it is in a measure novel in form, they consider such oral argument most important for its clear explanation.

XIII. As to the XIIIth paragraph of said petition, your respondents repeat that they feel confident that when duly reached and sustained by argument said decree will be upheld by the Supreme Court and not reversed. Since its entry, your respondents learn that it has excited wide attention and interest in various courts, and has been adopted by some of the ablest judges in other circuits as a model for foreclosure decrees in like cases, and they feel confident that careful consideration and experience will commend the wisdom and justice of the principles on which the decree is based, so that although the same be novel in some respects, it will be considered a precedent of great and lasting value.

The remainder of said paragraph your respondents cannot see to be material.

XIV. As to the XIVth paragraph of said petition these respondents do not wish at this time to make any charges against the petitioner or its officers and only ask that it shall execute its direct and legal duty under the order and decree of the Court.

XV. As to the XVth paragraph of said petition your respondents say that they do not believe the difficulties referred to therein will be encountered in an effort to execute the decree pending the appeal. In the first place, they are confident as aforesaid the decree will be eventually upheld in the Supreme Court. If however when the case be reached some two or three years hence on

the docket of the Supreme Court the case should contrary to their expectation be reversed we cannot see that any of the evil consequences mentioned would follow.

In the first place the Reversal could not affect the title passing to purchasers thereunder. But 2nd even if it did, the road would meanwhile be delivered into the hands of those interested in it, and be managed for its best interests by the first mortgage bondholders or their representatives. If at the expiration of such period, a reversal should take place, the only consequence would be that unless the affairs had so much improved as to render a foreclosure sale unnecessary a new decree of sale in some other form would be made, which the petitioner, or some successor in the trust would then execute, at which the corporation which had been meanwhile organized by the bondholders and carrying on the business could as well as other parties compete. But your respondents are firmly confident that if a sale and re-organization should once take place, the difficulties would be removed; practically unanimous consent obtained, and the appeal be withdrawn long before the case was reached in the Supreme Court.

They do not believe that any great additional expenditure would be involved, and they believe that any such expenditure would be more than compensated by the advantages resulting from the management by the bondholders of their own property.

But these respondents further say that all these matters are immaterial. The decree has been made, the term has passed, it is out of the power of the petitioner or of this Court to modify the decree or to interfere with or restrain its execution.

The petitioner as plaintiff has no personal property or right in the said decree, but holds the same only for the benefit of the bondholders for whom they brought the said their bill on which the decree was made. By the rules of equity as everywhere established, and especially by the rules laid down by the Supreme Court of the United States, every party interested in the decree, or in whose favor directly or indirectly the decree has been made has the same right to enforce the same as the complainant of record, and these respondents stand on their legal rights in demanding the execution of said decree, and that it shall be imme-

diately put in operation, and that there shall be no suspension thereof contrary to their desires and rights whatever be the consequences. This is a matter over which the complainants as well as the court have ceased to have any control. As intimated by this court at a former argument, the trust is merged in the decree; the bondholders' rights are in the decree, and the decree once made not being modified within the term, and not being legally superseded but remaining in full force and virtue, any bondholder has a right to insist on its execution by this Court and its Masters and officers and by the complainant, and your respondents stand here as bondholders and representatives of bondholders insisting on their legal rights and demanding the immediate execution of the decree entered by this Court as of October 22, 1875.

And your respondents pray that the court will make such order as at once to carry out and execute said decree.

And your respondents will ever pray, &c.

J. C. BULLITT,
C. C. COLE,
Of Counsel for Respondents.

EXHIBIT J.

UNITED STATES CIRCUIT COURT EIGHTH JUDICIAL CIRCUIT AT CHAMBERS.

DAVENPORT, February 22, 1877.

Farmers' Loan and Trust Co. vs. *Central Railroad Co. of Iowa.* — In U. S. Circuit Court District of Iowa.

Order that application of certain bondholders for an order on the Trustees to make a sale of the mortgage prorerty under the decree and the application of the said Trustees for directions in that behalf be set down for hearing before Dillon & Lowe J. J. at Davenport Iowa on Saturday the 3d day of March A. D. 1877 at 10 o'clock A. M. The Counsel for the respective parties Mr. Ashhurst of Philadelphia and Mr. Turner of N. Y. to serve each other before starting for Davenport with copies of all papers to be used on the hearing except records and files of the Court in this case—but said counsel may by stipulation waive this provision, with the consent of Judge Love the time for hearing may if counsel desire it be postponed for one week from the day above fixed.

Clerk enter this order.

JOHN F. DILLON,
Circuit Judge.

The Special Master will telegraph copy of this order or the substance to Mr. Ashhurst and Mr. Turner and N. A. Cowdrey and mail each a copy thereof and also to Judge Cole of Des Moines and Judge Lowe at Iowa City. Send original to Clerk.

JOHN F. DILLON.

A true copy.
Attest:
L. M. FISHER,
S. M.

EXHIBITS K 1, K 2.

Farmers' Loan and Trust Co.
vs.
Central R. R. Co. of Iowa.

U. S. Circuit Court,
District of Iowa.

IN THE MATTER OF THE PETITION OF THE SAID COMPLAINANT FOR ADVICE AND DIRECTION IN RESPECT TO MAKING A SALE UNDER THE DECREE, AND THE APPLICATION OF CERTAIN BONDHOLDERS FOR AN ORDER ON THE SPECIAL MASTER TO MAKE A SALE.

Dillon, Circuit Judge.

1. I am of the opinion that individual bondholders, not parties to the record, and who are represented by the Trustee have *no legal* right to demand that the Trustees shall order a sale under the decree, and have the same executed, if the Trustee is of opinion that the interests of all the bondholders would be best subserved by not having a sale made, pending the appeal.

2. The question whether a sale should be made under the decree pending the appeal, is one which primarily belongs to the Trustee to determine having in view the interest of all the *cestuis que trust.* That question the Trustee by the petition refers to the Court.

Under the circumstances I am of opinion that the Court ought not to order the Trustee to cause a sale to be made at the present time.

Such is also the opinion of Judge Love, hereto annexed and in which I concur.

An order can be made on the foregoing petitions in conformity with their views, and the Special Master will cause the order to be entered of record, and the respective counsel to be notified hereof. We decide the matter now so as to enable the parties who desire a sale to apply to the Supreme Court at this term for a *Mandamus* to compel the execution of the decree, if they shall so desire.

Love, J.—I have gone carefully over the papers, and given them the best consideration I could. I proceed to give you my impressions as to the disposition which ought to be made of the case. I have a very decided opinion that the Court ought not at present, and upon the showing made by the majority of the Bondholders to order the Trustee to execute the decree.

The case is a peculiar one: The Circuit Court did not enter the decree upon any independent consideration of the rights and equities of the parties, but solely upon the assumption that the parties to be affected by it assented to the provisions of the decree.

Now it turns out that this assumption was not well founded so far as the appellants who are now resisting its execution are concerned. The appellants are consequently seeking to get the decree reversed. It must be borne in mind that they have never yet had the judgment of any Court upon their rights and equities under the mortgage.

If the Court had passed its independent judgment upon their rights and equities and had made a decree disposing of them accordingly, and if they had failed to supersede the decree I do not see that they would have had any reason to complain, even though they could not in the event of a reversal be placed as to their rights, under the mortgage in *status quo*. But in the absence of any real adjudication by the Court, and by virtue of a consent, decree to which they were not parties, to have the property in which they are interested disposed of so that in the event of a reversal, they cannot be awarded the very relief to which they would be entitled by the terms of the mortgage would seem to me not at all in accordance with the principles of Equity. Again it is impossible for us to know what the decision of the Supreme Court will be and what complications may consequently arise from the execution of the decree in the meantime. Will the Supreme Court dispose of the case with reference to the fact that the decree below has been executed, and the trust property placed beyond judicial control, or, will it determine the controversy with reference to the state of the case, and property, at the time when the decree was entered below? I confess I do

not see the way clear in the future if the *status quo* of the trust property be changed as required by the terms of the decree, on the contrary it appears to me, that no complications can possibly arise if the decree be not executed. Nor can I see clearly that any special injury will result to the parties in interest by reason of the delay.

If the majority feel aggrieved by the refusal of the Court to grant their present motion, I suppose they have their remedy. They can apply for a *Mandamus*, and thus submit their case to the judgment of the Supreme Court and if it be a matter of right in them and not of discretion in the Circuit Court they can thus obtain redress.

(ENDORSED.)—U. S. Circuit Court, District of Iowa. Farmers' Loan and Trust Company *vs.* The Central R. R. Company of Iowa *et al.* Opinion of Dillon and Love, J.J. An application to compel Master to sell, etc.

Clubbed

RUSSELL SAGE AND OTHERS

vs.

THE CENTRAL RAIL ROAD COMPANY OF IOWA AND OTHERS.

IN THE

Supreme Court of the United States,

On the Petition for a Mandamus.

RELATOR'S BRIEF.

This case has already been before the Court at the present term; and the full opinion delivered by the Chief Justice, and the statement in detail of all the facts contained in the petition for Mandamus, render unnecessary anything more than a brief reference to them here.

The object of the present Petition is to procure the Execution of the Decree of the Circuit Court of the District of Iowa, dated October 22nd, 1875.

THE DECREE.

After a very full recital of all the facts connected with the litigation, the Decree goes on to say:

"That for the purpose of carrying out these promises in said mortgage contained, and in view of the fact found by the Master and confirmed by the Court, that the mortgaged property will not sell in cash for near enough to pay the amount due thereon, and that *the several parties in interest, including the first, second, and third mortgage bondholders, general creditors, and stockholders in said Central Railroad Company of Iowa, have united in asking the Court to so order the foreclosure and sale* of said mortgaged property as to preserve the priority of the first mortgage bondholders and at the same time permit the holders of the other subsequent liens and interests to participate in the benefit of such sale and foreclosure, it is therefore further ordered and decreed, that Lewis M. Fisher be and is hereby appointed a Master, for the purpose of making and

conducting the sale under the decree of said mortgage property, the same to be sold under the provisions of said first mortgage in the bill described. *The said sale to be made forthwith*, in default to pay, as herein decreed, at the front door of the County Court-house, in the City of Marshalltown, Iowa,—four weeks notice of the time and place of said sale to be given by said Master, by publishing notice thereof in the *Financier*, New York, and the Des Moines *Register*, and one newspaper published in Marshalltown, Iowa. That such property be sold to the highest bidder, and that the Master make full report of his proceedings to this Court for its consideration and approval. The said sale so made by said Master not to be deemed to be final until approved by this Court."

"*Fifth.*—That the said Farmers' Loan and Trust Company, Complainant herein, for the purpose of carrying out the agreement of the parties to said mortgage, is hereby authorized and directed to bid at the sale of said mortgaged property as trustee for the first mortgage bondholders, bidding thereat, at least, the amount of principal and interest of said first mortgage bonds."

PROCEEDINGS SUBSEQUENT TO DECREE.

On the 13th January, 1876, the Appellants prayed leave to intervene and moved to set aside the decree.

The motion to set aside was denied; but the Appellants were permitted to intervene for the purpose of appealing to the Supreme Court. If they desired this appeal to operate as a *supersedeas*, they were required to file a bond for $1,000,000—otherwise, the penalty of the bond was fixed at $2,000. They did neither; but applying on the 16th of February, 1876, to one of the Judges of the Supreme Court, he fixed the penalty of the bond, to operate as a *supersedeas*, at $20,000. The case then came before the Supreme Court, on a motion to vacate the *supersedeas*, which prevailed, and the opinion of the Chief Justice already referred to was pronounced.

The next step of the relators was to procure, if practicable, the execution of the decree of the 22nd October, 1875, which, as we have seen, required the sale of the mortgaged property to be made by the Master "forthwith," and for that purpose the Master was applied to, under the very natural impression,

that the *supersedeas* having been vacated, the Master would now proceed as he would have done immediately on the rendition of the decree.

The Master however, required authority from the Court which had appointed him; and, accordingly, the relators applied to it to direct the Master to proceed with the sale, which, upwards of fifteen months before, he had been directed to make "forthwith."

This application was denied, as appears by the order of the Court, presently to be noticed.

At about the same time, the Trustee, under the mortgage, applied to the Court "for advice and direction, concerning the sale of the Central Railroad, under the decree rendered in the cause." To this petition, an answer was filed; and the case coming up for hearing before Judge Dillon, on the 3rd March, 1877, he pronounced the following decision, refusing to order the sale.

ORDER OF MARCH 3RD, 1877, AND OPINIONS OF JUDGES DILLON AND LOVE.

1. I am of the opinion that individual bondholders, not parties to the record, and who are represented by the Trustee, have *no legal* right to demand that the Trustees shall order a sale under the decree, and have the same executed, if the Trustee is of opinion that the interest of all the bondholders would be best subserved by not having a sale made pending the appeal.

2. The question whether a sale should be made under the decree pending the appeal, is one which primarily belongs to the Trustee to determine, having in view the interest of all the *cestuis que trust.* That question the Trustee by the petition refers to the Court.

Under the circumstances, I am of opinion that the Court ought not to order the Trustee to cause a sale to be made at the present time.

Such is also the apinion of Judge Love, hereto annexed and in which I concur.

An order can be made on the foregoing petitions in conformity with these views, and the Special Master will cause the order to be entered of record, and the respective counsel to be

notified hereof. We decide the matter now, so as to enable the parties who desire a sale, to apply to the Supreme Court at this term for a *mandamus*, to compel the execution of the decree, if they shall so desire.

Love, J.—I have gone carefully over the papers, and given them the best consideration I could. I proceed to give you my impressions as to the disposition which ought to be made of the case. I have a very decided opinion that the Court ought not at present, and upon the showing made by the majority of the bondholders to order the Trustee to execute the decree.

The case is a peculiar one. The Circuit Court did not enter the decree upon any independent consideration of the rights and equities of the parties, but solely upon the assumption that the parties to be affected by it assented to the provisions of the decree.

Now it turns out that this assumption was not well founded so far as the appellants, who are now resisting its execution, are concerned. The appellants are consequently seeking to get the decree reversed. It must be borne in mind, that they have never yet had the judgment of any Court upon their rights and equities under the mortgage.

If the Court had passed its independent judgment upon their rights and equities, and had made a decree disposing of them accordingly, and if they had failed to supersede the decree, I do not see that they would have had any reason to complain, even though they could not in the event of a reversal be placed as to their rights, under the mortgage in *statu quo*. But in the absence of any real adjudication by the Court, and by virtue of a consent decree to which they were not parties, to have the property in which they are interested disposed of, so that in the event of a reversal, they cannot be awarded the very relief to which they would be entitled by the terms of the mortgage, would seem to me not at all in accordance with the principles of Equity. Again, it is impossible for us to know what the decision of the Supreme Court will be, and what complications may consequently arise from the execution of the decree in the meantime. Will the Supreme Court dispose of the case with reference to the fact that the decree below has been executed, and the trust property placed beyond judicial control, or,

will it determine the controversy with reference to the state of the case and property, at the time when the decree was entered below? I confess I do not see the way clear in the future, if the *status quo* of the trust property be changed as required by the terms of the decree, on the contrary, it appears to me, that no complications can possibly arise, if the decree be not executed. Nor can I see clearly that any special injury will result to the parties in interest by reason of the delay.

If the majority feel aggrieved by the refusal of the Court to grant their present motion, I suppose they have their remedy. They can apply for a *mandamus*, and thus submit their case to the judgment of the Supreme Court, and if it be a matter of right in them, and not of discretion in the Circuit Court, they can thus obtain redress.

EFFECT OF THE ORDER OF MARCH 3, 1877.

Now, it is very clear, from the record, that the only cause of delay subsequent to the decree of the 22nd October, 1875, when the Court ordered the Master to make the sale *forthwith*, was the intervention of the appellants.

But this had been disposed of by the Supreme Court; although it was on the docket, on its way to a hearing when reached, its effect as a *supersedeas* had been nullified—and so far, therefore, it was as though it had never taken place.

That the facts here stated are apparent on the record, cannot be disputed. And yet the Court below now gives to the Appellants the advantage of a stay of execution, which the Supreme Court, after grave deliberation, denied.

In the case of the United States *vs.* Trigg, 11 Peters, 173, the Supreme Court refused to order a mandamus where, although the case was ready for execution under the judgment, the Court below stated that "after mature deliberation" it had overruled the motion for execution; leaving it to the Supreme Court to infer that there may have been sufficient reason for its decision.

Here, however, there is no room for inference, for Judge Dillon, as we have seen, has stated the reasons which influ-

enced him in refusing to order a sale, and the District Judge has added those which operated upon his mind.

In a word, the Circuit Court of Iowa has now given, by anticipation, what would be their answer in case a rule to show cause were laid, by showing cause now—so that to lay the rule would only operate a useless delay to the further prejudice of the relators, who have already been subject to great loss through the conduct of the appellants—and this too in the absence of any security to respond to damages in the event of the affirmance of the decree.

JUDGE DILLON'S REASON FOR REFUSING TO ORDER A SALE.

We now come to the cause shown by Judge Dillon, which, as we understand, is, that the execution of the decree which ordered a sale "forthwith" is, after all, primarily discretionary with the Trustee.

The consequence of this view of the case, if it is law, then, is practically this, that after the Supreme Court has refused to permit a delay in executing the decree of the 22nd of October, the Trustee may delay a sale as long as it pleases, at the instance of a dissatisfied bondholder, even after the decree shall have been affirmed.

Surely, for all purposes, the Trustee, here, represents the *cestui que trusts*, and the decree in question was passed without objection on its part, as is shown by the record, and referred to as a fact in the opinion of the Chief Justice.

Whether one of the *cestui que trusts* might appeal or not was a matter in the discretion of the Court in Iowa, which, as the record shows, refused the application when first made, and granted it afterwards only upon execution.

Had the Court ultimately refused it, the *cestui que trust* who fancied himself injured, had still his remedy in Equity.

TRANSFER OF THE TRUSTEES' DISCRETION TO THE COURT.

The Trustee transfers its discretion to the Court—when it asks "for advice and direction;" and the Court then assumes to delay the execution of the decree without a *supersedeas* bond.

Any action which the Circuit Court would now take, other than ordering the Master to proceed with the execution of the decree, would be equivalent to a rehearing after the term at which the decree was rendered, and of course illegal.

Matters happening after the decree, may sustain it, while they cannot inure to its prejudice.

Roemer *vs.* Simon, 1 Otto, 149.
Pugh *vs.* McCulloh, 14 Wall., 561.
An. Vaughn, 14 Wall., 258.

After the term, the decree has become fixed, and cannot be modified or suspended.

Ex-parte Lange, 15 Wall., 163.
Jenkins *vs.* Eldrige, 1 Woodbury and Minot, 61.
Doss *vs.* Tyack, 14 Howard, 297,
Camden *vs.* McRoberts, 5 Wheaton, 591.
McMickin *vs.* Pierce, 18 Howard, 507.

In other words, the Court below—which said originally to the Appellants, if you want to prevent this sale, you must give a bond for $1,000,000, within 30 days from the date of the decree, cannot now stop the execution of the decree without any bond—which it does when it assumes the function of the Trustee, and puts off the sale, because the Appellants oppose it.

We respectfully submit that this cannot be done—nor do we find that the reasons given by Judge Love, that this was a consent decree which did not require the Court to exercise a legal judgment upon its propriety—that the Appellants had never had their rights judicially determined, and that complications, which are not enumerated, may arise,—add weight to the Court's decision.

GROUND TAKEN BY THE RELATORS.

To all this the relators reply, that the case stands now as it stood on the 22nd October, 1875, and that there is no more

reason now for delaying the sale, which was then directed to be made "*forthwith*," than there was then.

In the case of the *Board of Liquidation vs. McComb*, 2 *Otto*, 531, we find the latest decision bearing upon the present case as it now stands.—Judge Bradley there says:

"It is well settled that when a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have mandamus to compel its performance," and the judge compares it to the writ of injunction. "In such cases," he says, "these writs of mandamus and injunctions are somewhat correlative to each other."

A case that is on all fours with the present case, and which lays down the law that has never yet been departed from, is *Stafford vs. the Union Bank*, 17*th Howard*, 505, the only difference being, that there, the Court held that the *supersedeas* bond was insufficient, while here, the Supreme Court has declared that the bond which was given was void. In the case in 17th Howard the Court upon cause shown by the Court below, in response to the rule, ordered a peremptory mandamus. In the present case, the record already shows the cause of the Courts action, and in this way anticipates the necessity of a rule; and the relators insist most respectfully, that they are entitled at once to a peremptory mandamus.

It may without hesitation be said that in the cases where mandamus has been refused, the refusal was put upon the ground that something still remained to be done before the proceeding had sufficiently matured for execution, or that there still remained a discretion to be exercised by the Court below.

See, for a very full analysis of the law and mode of proceeding in matters of this sort, *ex parte Newman*, 14 *Wall.*, 161.

THE RIGHT OF THE RELATORS TO ASK FOR MANDAMUS.

That the relators are entitled to ask for the writ cannot it is thought be questioned on the authorities.

This right is expressly given by the 10th rule of Practice in Equity, laid down by the Supreme Court.

The relators and movers here, are certainly parties in whose favor "an order has been made." The decree shows it was made on their application, and to meet their wishes, and they are entitled to its enforcement for their relief.

In 2nd Daniell's Chancery Practice, 1563, it is laid down that all persons interested in supporting a decree are entitled to be heard in its support.

In re Stephens, 2 Phil., 563.
Foster *vs.* Tyler, 7 Paige, 48.

And Daniell also lays down (1079-80) that the same process applies to persons not parties as to parties, and cites General orders in Chancery of August 1841, No. 15, almost identical with Rule 10 of the Supreme Court.—See

Law *vs.* Oliver, 2 Hare, 97.
Galveston *vs.* Coudrey, 11 Howard, 459.
Ex parte Van Sandau, 1 Ph., 605.

Apparently the only party who cannot, pending an appeal insist in carrying it into execution, is the Appellant who cannot demand the enforcement of what he seeks to reverse.

1 Howard, 282,
17 Peters, 224.

It is insisted then, that the case stands now, since the vacation of the *supersedeas* by the Supreme Court, as it stood when the decree required it to be executed forthwith; and that the act to be done by the Court below and which it has refused to perform, being a purely ministerial one, involving the exercise of no discretionary power, a peremptory *mandamus* should be issued without delay.

TITLE OF PURCHASER PENDING APPEAL.

It is hardly to be supposed that the Appellants will deny that a good title will pass to the purchaser at the sale, were it now to take place, and contend that the sale should be postponed until the determination of the appeal. On this point the authorities are full.

Reversal of a decree of probat will not effect the title of a *bona fide* purchaser from an executor under power, &c.

Foulke *vs.* Zimmerman, 14 Wallace, 113.

A sale of land regularly made under a judgment of a Court of record is valid, and subsequent reversal on appeal cannot affect the title of the purchaser.

Gilpin *vs.* Paige, 1 Sawyer, 309.

A decree reversed in error, after sale, restoration can only be of money equivalent, not of the property sold.

Vorhees *vs.* Bank of U. S., 10 Peters, 147.

Although judgment or decree may be reversed, yet all rights acquired at judicial sales while the decree or judgment are in force, and which they authorized, will be protected.

Gray *vs.* Brigniardello, 1 Wall., 627.

South Fort Canal Co. *vs.* Gordon, 2 Abbott's U. S., Reports, 479.

Thompson *vs.* Tomlie, 2 Peters, 68.

Grignon's lessee *vs.* Asten, 2 Howard, 125.

This case is an important one. The bondholders of each class and the general creditors—all provided for in a decree carefully considered, and a model in the equity of its provisions,—have been struggling, year after year, against a comparatively small minority, of whom it is no want of charity to say, that their interest has been to depreciate the bonds of the Company for speculative purposes.

Nothing but the steady persistence of the Relators has saved the road from falling, long ere this, into the category of wrecked institutions; and they rely upon the early execution of the decree as the only means left to them of saving their property from ruin.

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RICHARD L. ASHHURST,

For the Relators.